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No. 82-274

In the Supreme Court of the United States

October Term, 1982

COMMONWEALTH OF PENNSYLVANIA
et al.,
Petitioners

vs.

DELAWARE VALLEY CITIZENS' COUNCIL
FOR CLEAN AIR
and
UNITED STATES OF AMERICA,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF THE QUESTIONS PRESENTED

1. Whether a federal court can hold a state and its executive branch officials in contempt of a consent decree because of the state legislature's failure to appropriate in perpetuity funds necessary to exercise a police power function?

2. Whether a federal court can block the United States from funding highway projects authorized by Congress as a sanction for the inability of state officials to implement a consent decree having nothing to do with those highway projects?

3. Whether a federal court can impose a sanction for contempt without considering the harm caused thereby to millions of innocent third parties?

4. Whether a federal court exceeded its authority by arrogating to itself the power to approve or disapprove each decision of executive branch professionals concerning the certification of state highway projects as related to safety, air quality, or mass transit?

TABLE OF PARTIES

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR; AMERICAN LUNG ASSOCIATION OF PHILADELPHIA AND MONTGOMERY COUNTY; DELCHESTER LUNG ASSOCIATION; SIERRA CLUB, PENNSYLVANIA CHAPTER; FRIENDS OF THE EARTH OF THE DELAWARE VALLEY; CITIZENS' COMMITTEE FOR ENVIRONMENTAL CONTROL; KEVIN QUINN, KAYSI FARRELL, RUTH G. WEISS; JOHN KLINKNER, ELIZABETH S. BIEZ; MONA SHULMAN

Plaintiffs

v.

COMMONWEALTH OF PENNSYLVANIA; WILLIAM T. SHERLOCK, Individually and as Secretary of the Pennsylvania Department of Transportation; MAURICE K. GODDARD, Individually and as Secretary of the Pennsylvania Department of Environmental Resources

Defendants

(D.C. Civil No. 76-2068)

UNITED STATES OF AMERICA

Plaintiff

v.

COMMONWEALTH OF PENNSYLVANIA; the PENNSYLVANIA DEPARTMENT OF TRANSPORTATION and WILLIAM T. SHERLOCK, Secretary of the Pennsylvania Department of Transportation; the PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MAURICE K. GODDARD, Secretary of the Pennsylvania Department of Environmental Resources

Defendants

(D.C. Civil No. 77-0619)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, the Commonwealth of Pennsylvania, Thomas D. Larson, the Pennsylvania Secretary of Transportation, and Peter S. Duncan, the Pennsylvania Secretary of Environmental Resources, hereby respectfully petition this Court that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which was entered in this case on May 21, 1982.

I. OPINIONS OF THE COURTS BELOW

The opinion of the District Court dated January 22, 1982, is reported at 533 F. Supp. 869. The opinion of the District Court dated February 18, 1982, denying the motion for a stay is reported at 533 F. Supp. 885. These two opinions are reproduced at 1a to 34a and at 35a to 38a respectively.

On March 19, 1982, the Court of Appeals granted a stay and on April 6, 1982, the Court denied a petition for rehearing on the stay. These two opinions are not yet reported and are printed in the Appendix at 39a to 41a, and at 42a to 49a. The opinion of the Court of Appeals dated May 21, 1982, is reported at 678 F.2d 470 (3d Cir. 1982) and is reproduced at 50a to 68a.

II. JURISDICTION

The judgment of the Court of Appeals was entered on May 21, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Article I, Section 8, Clause 7:

"The Congress shall have Power . . . To establish Post Offices and post Roads. . . ."

2. United States Constitution, Article I, Section 9, Clause 7:

"No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . ."

3. United States Constitution, Article I, Section 1:

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

4. United States Constitution, Tenth Amendment:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

5. Pennsylvania Constitution, Article III, Section 24:

"Paying out public moneys.

No money shall be paid out of the Treasury, except on appropriations made by law. . . ."

6. Clean Air Act Amendments of 1977, Public Law 95-95, 91 Stat. 749, 750, §176; 42 U.S.C. §7506:

"Limitations on certain Federal assistance.

(a) The Administrator shall not approve any projects or award any grants authorized by this chapter and the Secretary of Transportation shall not approve any projects or award any grants under Title 23 other than for safety, mass transit, or transportation improvement projects related to air quality improvement or maintenance in any air quality control region—

(1) in which any national primary ambient air quality standard has not been attained,

(2) where transportation control measures are necessary for the attainment of such standard, and

(3) where the Administrator finds after July 1, 1979, that the Governor has not submitted an implementation plan which considers each of the elements required by section 7502 of this title or that reasonable efforts toward submitting such an implementation plan are not being made (or, after July 1, 1982, in the case of an implementation plan revision required under section 7502 of this title to be submitted before July 1, 1982).

(b) In any area in which the State or, as the case may be, the general purpose local government or governments or any regional agency designated by such general purpose local governments for such purpose, is not implementing any requirement of an approved or promulgated plan under section 7410 of this title, including any requirement for a revised implementation plan under this part, the Administrator shall not make any grants under this chapter."

IV. STATEMENT OF THE CASE

This action was commenced in July, 1976 by Delaware Valley Citizens' Council for Clean Air[1] (hereinafter "Delaware Valley") against the Commonwealth of Pennsylvania and certain of its Executive Branch officials[2] (hereinafter "Defendants").[3] Plaintiff sought to compel the Defendants to implement an emission inspection and maintenance program (hereinafter "I/M program") in fourteen of Pennsylvania's 67 counties. Also named as a defendant was an official of the United States Environmental Protection Agency whom Plaintiff sought to compel to have the Defendants implement an I/M program.[4] Plaintiff based its complaint on the Clean Air Act of 1970, 42 U.S.C. §1857, et seq. (since amended and reclassified

[1] Delaware Valley is a nonprofit corporation organized under the laws of the Commonwealth of Pennsylvania.

[2] The named defendants are William T. Sherlock, Secretary of the Pennsylvania Department of Transportation and Maurice K. Goddard, Secretary of the Pennsylvania Department of Environmental Resources. The present Secretary of the Pennsylvania Department of Transportation is Thomas D. Larson; the present Secretary of the Pennsylvania Department of Environmental Resources is Peter S. Duncan.

[3] The Pennsylvania General Assembly was not named as a party to this action, although certain of its members moved unsuccessfully to intervene as defendants.

[4] An emission inspection and maintenance program consists of checking the tailpipe emissions (hydrocarbons and carbon monoxide) of vehicles by means of an analyzer and requiring that vehicles which exceed a specified level of emissions have repairs performed to lower their emissions to the specified level.

at 42 U.S.C. §7401 et seq.). In February, 1977, the United States commenced a second suit seeking to compel Defendants to implement an I/M program. As a result, Delaware Valley dismissed the Environmental Protection Agency official as a defendant in its action.

On August 29, 1978, the parties entered into a consent decree requiring Defendants to implement the I/M program. The consent decree provided, *inter alia*, for implementation of the I/M program in ten counties in metropolitan Philadelphia and Pittsburgh, Pennsylvania by February 1, 1981, later extended to November 1, 1981 by agreement of all parties.[5]

Between 1979 and 1981 the Defendants took a number of steps to comply with the consent decree. The Pennsylvania Department of Transportation ("PennDOT") promulgated regulations for operation of the I/M program (67 Pa. Code §177.1 *et seq.*) and established a program to train instructors and mechanics, with the help of public and private educational facilities. The Department certified approximately 3,000 stations for Phase I of the testing of emission control devices. The Department opposed two actions in state court seeking to prevent implementation of the emission inspection program. In addition, De-

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[5] On April 29, 1981, Defendants filed a motion with the United States District Court to modify the consent decree by postponing the date for implementation of I/M to January 1, 1983. Delaware Valley opposed this motion. On May 20, 1981, the District Court denied this motion, and on June 16, 1981, the Court ordered the I/M program to begin by May 1, 1982. The Court of Appeals on March 1, 1982, upheld the order of the District Court and on March 26, 1982, denied a petition for rehearing en banc. On June 21, 1982, Defendants filed a Petition for Certiorari from the Order of March 1, 1982.

fendants are still implementing all elements of its State Implementation Plan under the Clean Air Act except the I/M program. That plan includes standards requiring control measures for stationary sources such as petroleum storage facilities, refineries and other industrial plants.

On October 5, 1981, however, the Pennsylvania General Assembly enacted H.B. 456, over the veto of Pennsylvania Governor Dick Thornburgh, prohibiting PennDOT or any other department or agency of the Executive Branch of the Commonwealth from spending any public funds for the I/M program.[6] Act No. 1981-99, §2, 71 P.S. §523 (Supp. 1982). Within two weeks of the enactment of Act No. 1981-99 over the Governor's veto, Defendants sought to stay and to modify the 1978 consent decree because the passage of Act No. 1981-99 had deprived them of any legal authority to spend money to carry out the I/M program. Delaware Valley filed a motion to declare Defendants in civil contempt and to impose sanctions.

On January 22, 1982, the District Court granted the contempt motion, denied the Defendants' motion, and ordered the United States Secretary of Transportation to withhold any approvals of or grants for highway projects in the ten counties surrounding Philadelphia and Pittsburgh, except where found by the Court to be related to safety, air quality, and mass transit. *Delaware Valley Citizens Council for Clean Air v. Commonwealth of Pennsylvania*, 533 F. Supp. 869 (E.D. Pa. 1982) (1a-34a). The amount of funds affected for 1982 alone was $302,-

[6] Governor Thornburgh on December 28, 1979, successfully vetoed H.B. 739, which sought to delay the I/M program.

000,000. On February 18, 1982, the District Court refused to stay its order pending appeal. *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*, 533 F. Supp. 885 (E.D. Pa. 1982) (35a-38a).

Thereafter, Defendants appealed to the Court of Appeals for the Third Circuit and moved that Court for a stay after the District Court denied a stay. The City of Pittsburgh, the County of Allegheny, the Greater Pittsburgh Chamber of Commerce, the Greater Philadelphia Chamber of Commerce, the Associated Pennsylvania Constructors, and the Pennsylvania Asphalt Pavement Association supported Defendants' appeal and motion for a stay as *amicus curiae*. On March 19, 1982, the Court of Appeals (per the Honorable Arlin M. Adams and the Honorable James Hunter, III, with the Honorable Leonard I. Garth, dissenting) stayed the District Court's order pending submission of this case to a merits panel on May 13, 1982. The Court of Appeals denied Delaware Valley's motion for reconsideration of the stay; as Judge Adams stated on the denial of reconsideration, the Court granted the stay to prevent the loss of funding for important highway projects pending the appeal, and to avoid inflicting unnecessary and perhaps irreparable hardship upon the citizens of Pennsylvania.

On May 21, 1982, the Court of Appeals affirmed the District Court's judgment, holding that because the Commonwealth of Pennsylvania was a party to the consent decree, all its branches, including the Legislature, were bound by that decree. Accordingly the Court found the "Commonwealth" and the executive official defendants to be in contempt because of the legislature's failure to ap-

propriate funds and upheld the sanction imposed by the District Court.[7] It is this decision which Defendants ask this Court to review.

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[7] On June 7, 1982, Defendants filed a motion to stay the Court of Appeals mandate and the order of the District Court. The Court of Appeals denied this motion on June 23, 1982, and certified its May 21, 1982 judgment in lieu of a mandate. An application for a stay of that judgment was denied by Justice Brennan on July 29, 1982, and was resubmitted to Justice Rehnquist on July 30, 1982, who referred it to the entire Court, where it is presently pending.

V. REASONS FOR GRANTING THE WRIT

A. A Federal Court Cannot Hold a State and Its Executive Branch Officials in Contempt of a Consent Decree Because of the State Legislature's Failure To Appropriate in Perpetuity Funds Necessary To Exercise a Police Power Function

1. The lower Courts' orders interfere with Pennsylvania's appropriations process, raising serious questions of federalism and separation of powers.

In this case, the Third Circuit upheld a judgment that the Commonwealth of Pennsylvania and two of its Executive Branch officials can properly be held in civil contempt because the state legislature enacted legislation barring the state's Executive Branch from spending state funds to implement the I/M program established by the consent decree. The Third Circuit's holding raises the question of whether the federal courts may interfere with a state's right to control its own legislative appropriations process, especially when no federal constitutional rights of private parties are involved.

One Court of Appeals has held that:

> No right of a state is entitled to greater respect by the federal courts than the state's right to determine how revenues should be raised and how and for what purposes public funds should be expended (and) needless confrontations between a federal court and

> a state should be avoided particularly in a field as delicate as the one here involved.

Welsch v. Likins, 550 F.2d 1122, 1131-32 (8th Cir. 1977). The lower courts' decisions in this case endanger this fundamental right of a state, through its legislature, to control its own financial affairs.

The Third Circuit justified this massive intrusion into the state legislative process on the ground that the Commonwealth of Pennsylvania was a named party to the litigation and the consent decree and that, therefore, all branches of the Commonwealth, including its legislative branch, were bound by that decree. 678 F.2d at 475 (59a). Thus, according to the Third Circuit, the Commonwealth's status as a named defendant in a consent decree, without more, binds the legislature then in session *and future sessions* to appropriate monies to carry out the consent decree. This holding would destroy the delicate balance between federal and state governments and between the executive, judicial, and legislative branches of state government.

Article III, Section 24 of the Pennsylvania Constitution provides: "No money shall be paid out of the treasury except on appropriations made by law." Thus, in Pennsylvania, the legislature has the exclusive power of appropriation. *Shapp v. Sloan*, 480 Pa. 449, 473, 391 A.2d 595, 606 (1978), *appeal dismissed sub nom., Thornburgh v. Casey*, 440 U.S. 942 (1979). Yet, according to the Third Circuit's analysis, executive branch officials such as the Attorney General can, by entering into a consent decree in the name of the "Commonwealth", bind the Commonwealth to operate an I/M program indefinitely into the future, thereby exercising irrevocably both the power

of appropriation and the state's police power.[8] The Third Circuit would allow those officials, by using the federal courts, to assume powers left by the State Constitution exclusively to the legislative branch of government.

Moreover, even if the Pennsylvania General Assembly had been a party to the 1978 consent decree (which it was not), the General Assembly in session at that time simply could not have purported to preclude subsequent legislatures from exercising their constitutional right to pass laws. *Mott v. Pennsylvania Railroad Co.*, 30 Pa. 9 (1858). No legislative body can commit its successors to exercise the state's police power in a certain way. *Stone v. Mississippi*, 101 U.S. 814 (1880). Nor may a legislative body bind its successors to fund an exercise of that power in perpetuity. *Commonwealth ex rel. Fortney v. Bartol*, 342 Pa. 172, 174-175, 20 A.2d 313 (1941), and cases cited therein. Certainly, the 1978 General Assembly could not have delegated to Executive Branch officials a power which it, itself, did not have. Thus, no executive

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[8] Specifically, the Third Circuit concluded that the Attorney General was empowered to enter into this consent decree on behalf of the legislature. 678 F.2d at 475 (59a). In so doing, the Court of Appeals could cite only its own prior holding in *Vecchione v. Wohlgemuth*, 558 F.2d 150 (3d Cir. 1977). That case dealt only with the power of the Attorney General to represent individual defendants. Just as importantly, its conclusion rested solely on statutory provisions expressly empowering the Attorney General to represent executive administrative bodies and officials. 71 P.S. §§292-293 (since repealed). Under Pennsylvania law, the Attorney General, as a member of the Executive Branch, could not have represented another branch of government in litigation, let alone have exercised the basic constitutional powers of that branch. Pennsylvania Attorney General Opinion No. 75-9, February 24, 1975 (69a-74a).

branch official could, by signing the consent decree, have bound the General Assembly to appropriate funds to implement that decree indefinitely into the future.

It follows that a federal court cannot require the parties to the consent decree to exercise a greater power than they can possibly exercise on their own. Accordingly, no federal court can require a state legislature to appropriate funds in perpetuity or place a state and its officials in contempt for failure to do so. *New York State Association for Retarded Children, Inc. v. Carey*, 631 F.2d 162 (2d Cir. 1980).

The Pennsylvania General Assembly's constitutional power to decide whether or not to appropriate funds for I/M was implicit in the consent decree as a matter of law. Under Pennsylvania law, any contract with the government is conditioned upon legislative appropriation. See *Shapp v. Sloan*, 480 Pa. 449, 473, 391 A.2d 595, 606 (1978), *appeal dismissed sub nom., Thornburgh v. Casey*, 440 U.S. 942 (1979). This rule must apply equally to consent decrees. Otherwise, as is noted above, state executive officials could use the federal courts to exercise powers which, under state law, are vested exclusively in the legislature. Thus viewed, the Third Circuit's finding that there was "no evidence" of the condition of future appropriations—"even implicitly"—is both irrelevant and erroneous.[9]

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[9] Even the Plaintiffs in this case have admitted that the Legislature's power to decide whether or not to fund I/M was an implied condition in the consent decree. In prior proceedings in this case, Plaintiffs conceded that the consent decree did not require the General Assembly to appropriate funds for its implementation. Specifically, in opposing intervention by state legisla-

Moreover, there is no basis for holding the executive branch officials in contempt in this case. In *Maggio v. Zeitz*, 330 U.S. 56 (1948), this Court held that a party cannot be held in contempt for failing to perform an act which he or she is unable to perform. This principle is directly applicable to the executive branch defendants in this case. State executive branch officials have only those powers granted them by the laws of the Commonwealth

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tors who sought to attack the consent decee, Delaware Valley stated:

> One of the requirements . . . [of the decree] is that the Governor, as chief of the Executive Branch of the Commonwealth, would have to seek adequate funding for the I/M program. If the governor is required to submit a budget to the General Assembly in order to fund the I/M program, the General Assembly might be able to require the Governor's budget proposal to identify with specificity the funds to be appropriated to the I/M program. See 71 P.S. §233. *The General Assembly, including the applicants, has the power to reject proposed appropriations for the I/M program.* Thus, it is clear that the consent decree and its modification do not affect applicants' duties and obligations. (Emphasis added.)

Memorandum of the Plaintiffs Delaware Valley Citizens' Council for Clean Air, et al. in Opposition to the Motion of Edward P. Zemprelli, et al. To Intervene as a Defendant, p. 7 (filed May 2, 1980).

Likewise, in opposing intervention, the United States stated:

> The Consent Decree by its terms *does not require the Legislature to appropriate any monies for I/M* although certainly the failure to fund PennDOT at all could conceivably result in an inability of the Commonwealth to run an I/M program. (Emphasis added.)

Response of the United States in Opposition To Motion To Intervene as a Defendant of Edward P. Zemprelli, et al., p. 12 (filed May 2, 1980).

of Pennsylvania. Under those laws, defendants *cannot* spend monies not appropriated by the legislature. *Shapp v. Sloan*, 480 Pa. 449, 463, 391 A.2d 595, 602 (1978), *appeal dismissed sub nom., Thornburgh v. Casey*, 440 U.S. 942 (1979); *Burd v. Commonwealth*, Pa. Commonwealth Ct. , 443 A.2d 1197 (Pa. Commonwealth Ct. 1982). In Pennsylvania, the legislature has total power of appropriation, and absent appropriation there is no money for the agencies and officials of the executive branch to spend. *Shapp v. Sloan, supra; Burd v. Commonwealth, supra.* It is not a question of legality, but rather of power. Thus, the Third Circuit's attempt to distinguish *Maggio, supra*, because "there has been no showing that there were no funds physically reachable" for I/M, was simply misconceived. 678 F.2d at 476, n. 13 (61a). The legislature's express prohibition on expenditure of state funds for the I/M program made it impossible for the executive branch defendants to comply with the consent decree in this case. Just as this Court barred a finding of contempt in *Maggio*, supra, the impossibility of compliance in this case bars a finding that the executive branch officials are in contempt.

Finally, this Court has long recognized that state legislators cannot be held liable in federal court for their legislative actions. *Tenney v. Brandhove*, 341 U.S. 367 (1950). This immunity extends to actions for declaratory and injunctive relief as well as actions for damages. *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 732-33 (1980).[10] Yet, according to

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[10] Certainly there can be no argument that sovereign immunity was waived in this case. This Court has repeatedly recognized that waivers of a state's sovereign immunity must be clearly

the Third Circuit, a federal court could apparently, under certain circumstances, fine or even jail members of a state legislature until they enacted legislation deemed appropriate by that court to implement a consent decree.[11]

Simply stated, and as the District Court in this case clearly conceded, "a federal court on the present record lacks the power under our federalist system to countermand the decision of a state legislature not to expend state funds on the establishment of an I/M program".[12] 533 F. Supp. 869, 878 (17a). Yet, the Third Circuit's and the District Court's orders do just that—if only indirectly—by way of a coercive sanction, rather than a direct order. This gross interference with the state's constitutionally created appropriations process presents an issue of federalism which this Court should review.

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stated. See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). Waivers of legislative immunity should be equally explicit. Even the Third Circuit found no such clear waiver in this case.

[11] Specifically, the Third Circuit noted that "[c]ivil contempt proceedings against state officers may justifably result in the fining or even the conditional jailing of those officials." 678 F.2d at 478 (67a). However, the court refused to decide "[w]hether such action might have been warranted against either state legislative or executive branch officers in the circumstances of this case." *Id.*

[12] The District Court based this concession at least in part on the Tenth Amendment to the United States Constitution. This Court has previously granted certiorari in cases questioning, on Tenth Amendment grounds, the ability of the federal legislative and executive branches to interfere directly with the state's legislative process in the context of air pollution. *Environmental Protection Agency v. Brown*, 426 U.S. 904 (1976). This case raises a similar issue concerning the relationship of the federal judiciary to the state legislative process and is, therefore, equally deserving of consideration by this Court.

2. The decision in this case conflicts with the decision of the Second Circuit in New York State Association of Retarded Children, Inc. v. Carey, 631 F.2d 162 (2d Cir. 1980).

This case is on all fours with a recent decision on separation of powers and federalism issues by the United States Court of Appeals for the Second Circuit, *New York State Association of Retarded Children, Inc. v. Carey*, 631 F.2d 162 (2d Cir. 1980). In *Carey*, the Second Circuit reversed a District Court order holding New York State officials in contempt for failure to carry out a consent judgment that had established a panel to review conditions at an institution for the mentally retarded. The state officials had been unable to carry out the order because the New York State Legislature, exercising its appropriations power under Article VII, Section 7 of the New York State Constitution, had cut off funding for the review panel.

The Court of Appeals in *Carey* distinguished cases in which federal courts required states to comply with their decrees, because the Courts in those cases did not force state officials to expend funds for a purpose expressly disallowed by the state legislature:

> Appellees rest this argument upon cases which hold that a state action, or inaction, cannot defeat a constitutional or federally created right. See, e.g., *State of Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 444 U.S. 658 (1979); *North Carolina Board of Education v. Swann*, 402 U.S. 43 (1979). [These cases] did not, however, involve the remedy ordered in this case—that a state official expend state funds for a purpose expressly disallowed by the State Legislature. We

> have previously held, and repeat here, that a Federal District Court ought not to put itself 'in the difficult position of trying to enforce a direct order . . . to raise and allocate large sums of money . . . steps traditionally left to appropriate executive and legislative bodies responsible to the voters'. *Rhem v. Malcolm*, 507 F.2d 333, 341 (2d Cir. 1974).

631 F.2d at 165. The Second Circuit also noted that, in order to obey the consent decree, the New York officials would have had to violate the Constitution and laws of New York State, which proscribed expenditure of state funds without an appropriation. 631 F.2d at 164. The lower courts' orders in this case have placed Defendants in exactly this predicament.[13] The resulting conflict between the Circuits should be resolved by this Court.

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[13] As noted above, state executive branch officials cannot, either as lawyers or parties, bind the legislature to appropriate money. To the contrary, all such officials can promise is to exert "best efforts" to convince the legislature to make appropriations. Accordingly, the Third Circuit's attempt to distinguish *Carey* on the basis of an express "best efforts" provision in the *Carey* consent decree is without merit.

In any case, as is also noted above in fn. 9, plaintiffs conceded that the decree required only the best efforts of the executive branch, but not necessarily action by the legislature. Finally, under Pennsylvania law, any contract with state government is conditioned upon legislative appropriation.

B. The Lower Courts Have Exceeded Their Authority and, in Addition, Their Decisions Conflict With the Decisions of the Seventh and Eighth Circuits

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1. The lower Courts' orders blocking payment of Federal highway funds to Pennsylvania interfere with Congress' exclusive power to appropriate money under the United States Constitution and conflict with the principles of the Eighth Circuit's decision in State Highway Commission of Missouri v. Volpe, 479 F.2d 1099 (8th Cir. 1973).

The lower courts in this case have blocked highway project approvals and effectively impounded highway funds apportioned to Pennsylvania by the United States Congress under the Federal Aid Highway Act, 23 U.S.C. §101 *et seq.* This judicial impoundment is beyond the power of the courts.

Article I, Section 8, clause 7 of the United States Constitution gives the United States Congress the power to establish post roads. Article I, Section 1, and Article I, Section 9, clause 7 of the United States Constitution give Congress the exclusive power to appropriate federal funds. While federal courts admittedly have broad powers to coerce compliance with their orders, they may not impinge upon the exclusive powers of Congress to establish roads and appropriate funds. The sanctions imposed in this case do both.

In *State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099 (8th Cir. 1973), the United States Court of Appeals for the Eighth Circuit reaffirmed the broad reach of Congress' power over highway construction in a dispute over presidential impoundment. The Eighth Cir-

cuit enjoined the United States Department of Transportation from impounding highway funds that had already been apportioned to the State of Missouri, because Congress had not provided for impoundment in such circumstances and *only Congress* had the constitutional right to dictate the terms for highway construction:

> . . . we note that in legislating the Federal-Aid Highway Act, Congress was acting under Article I, Section 8 wherein it is given its express constitutional authority to establish "Post Roads." After granting several additional powers to Congress, Article I, Section 8 concludes by setting forth that Congress may "make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof." It seems reasonable to say that until and unless Congress acted under Article I, neither the Secretary nor anyone else within the Executive Branch of the government could build a federally aided highway system. *The only branch of government which has the constitutional power to build roads is the only one which has the authority to dictate the terms under which the construction can be carried out.*

479 F.2d at 1111. (Emphasis added.)

The *Missouri Highway Commission* decision invalidated executive branch impoundment of highway funds in the absence of any express authorization from Congress. In this case, the lower courts have practiced judicial impoundment without express congressional authority. Such

impoundment is no more proper than impoundment by the executive.

The District Court held, and the Third Circuit reiterated, that §176(a) "suggested" a remedy of a highway funds cutoff in this case. 533 F. Supp. at 882-884; 678 F.2d at 477-478 (25a-30a and 65a-66a). This holding was in error. Section 176 of the Clean Air Act, 42 U.S.C. §7506, provides for the withholding of certain federal funds by administrative action only when it is determined, after an administrative hearing, that a state has failed either to submit to the United States Environmental Protection Agency, or to carry out, a state implementation plan for the attainment of air quality standards ("SIP"). The funds that may be withheld for failure of a state to implement any portion of a SIP are limited to the federal subsidy for state air pollution control programs, §176(b). Federal highway funds may only be withheld for failure to submit any SIP at all, §176(a). These provisions can be invoked only by the United States Department of Transportation or the Environmental Protection Agency, not by a court, although a court may refer a case to an agency for imposition of proper sanctions under appropriate circumstances. See *Reichenthal v. Harris*, 492 F. Supp. 637 (E.D. N.Y. 1980) (per Weinstein, J.)

Thus, Congress has expressly determined the circumstances and procedures under which federal monies will flow to the states and has left to the executive branch the power and duty to determine whether these circumstances exist and the sanctions to impose if they do not. Implicitly then, Congress has also determined that the money shall flow *unless* the executive branch makes the appropriate determinations. Here, since Pennsylvania *has* submitted

a SIP, and in fact, is implementing all elements of that SIP in all respects except I/M, §176(b) is the only statute that the EPA itself could have invoked under these circumstances.[14]

Section 176 is a traditional exercise by Congress of its spending power as an inducement to the states to exercise their police power, with precisely drawn gradations. The District Court and the Third Circuit, however, transformed this into a coercive sanction that even the Executive Branch could not have imposed in administrative proceedings under Section 176. By blocking the payment of appropriated funds to Pennsylvania under circumstances not contemplated by Congress, the lower courts have improperly interfered with the exercise by Congress of its exclusive power of appropriation. Such interference is not permitted, even in exercising the broad judicial power to sanction contempt. By permitting such interference, the Third Circuit decision conflicts with the decision of the Eighth Circuit in *State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099, 1111 (8th Cir. 1973). This conflict, and the important issue raised thereby, should be resolved by this Court.

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[14] In fact, EPA has commenced proceedings to impose Section 176(b) sanctions and has not acted to impose Section 176(a) sanctions. See 47 Fed. Reg. 9477 (March 5, 1982) and 47 Fed. Reg. 25743 (June 15, 1982).

2. The lower Courts' decision to impose sanctions without considering the effect of the sanctions on innocent third parties, including taxpayers and the traveling public, is an abuse of discretion and conflicts with the principles of the decisions of this Court in City of Newport v. Facts Concerts, Inc., 453 U.S. 247 (1981) and the Seventh Circuit in Gautreaux v. Romney, 457 F.2d 124 (7th Cir. 1972).

The lower courts have failed to consider the harm to the taxpayers of Pennsylvania and citizens and businesses in the areas affected by the highway funds cutoff, as well as others who travel through these areas, as a result of the courts' cutoff of highway funds. Courts of equity have an obligation to consider these interests, even when seeking to further laudable social goals.

In *City of Newport v. Facts Concerts, Inc.*, 453 U.S. 247 (1981), this Court held that a municipality could not be held liable for punitive damages in a civil rights action, because such damages would ultimately harm innocent taxpayers:

> Regarding retribution, it remains true that an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort. These damages are assessed over and above the amount necessary to compensate the injured party. Thus, there is no question here of equitably distributing the losses resulting from official misconduct. . . . Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither

> reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.

453 U.S. at 267. (Footnotes omitted.)

Identical policy considerations apply in the instant case. In fact, the courts have imposed a punitive sanction against the Commonwealth of Pennsylvania far more draconian than the $275,000 punitive damages involved in the *City of Newport*. The courts have cut off $141,000,000 in highway funds to which innocent Pennsylvania taxpayers are entitled this year; at least $80,000,000 of these funds may lapse by September 30, 1982. The cutoff will be felt by each motorist and business having any contact with Philadelphia and Pittsburgh. The cutoff for this year will cause a loss of about 14,000 jobs during times of already high unemployment. Over the next five years, the funding cutoff could cost 100,000 jobs and $1,000,000,000. As the Court held in the *City of Newport* case, "[n]either reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." 453 U.S. at 267.

The harsh remedy upheld by the Third Circuit also stands in stark contrast to the principles of the decision of the Seventh Circuit in *Gautreaux v. Romney*, 457 F.2d 124 (7th Cir. 1972). In *Gautreaux*, the Seventh Circuit properly conducted a balancing test and reversed a District Court order that had cut off $26,000,000 in Model Cities funding for Chicago because of housing discrimination in the city. The Seventh Circuit held:

> Certainly, the District Court's order lacked a balancing of the individual and collective interests in-

> volved. The Court ignored the interest of poor people, mostly Black, intended by Congress to be the beneficiaries of the Model Cities program while seeking enforcement of a timetable for the erection of housing units in white areas which although laudable, could not be achieved in time to prevent the catastrophe threatened by the District Court's order terminating Federal funds to a program not found to be discriminatory.

457 F.2d at 127.

In this case, the lower courts have totally ignored the balancing test employed in *Gautreaux*,[15] and have failed to consider the effect of the highway funds cutoff on innocent citizens and businesses who pay taxes and use highways. The remedy chosen by the lower courts is a clear abuse of discretion under the circumstances.

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[15] The Circuit Court attempted to distinguish *Gautreaux* on the superficial basis that it "involved not the appropriateness of a coercive sanction to compel compliance with an incontestably valid final injunction, but the scope of injunctive relief in the first instance." 678 F.2d at 478 (67a-68a). As Judge Bechtle observed, however, a court sits in equity when it fashions a coercive remedy. *Delaware Valley Citizens' Council for Clean Air v. Commonwealth*, 538 F. Supp. 869, 882 (25a). It follows that a court should properly exercise equitable discretion in imposing a contempt sanction. The Court of Appeals' statement that the *Gautreaux* injunction was "relief in the first instance" glosses over the factual history of the *Gautreaux* case. At the time of the Circuit Court's decision in *Gautreaux*, litigation had been pending for seven years, during which time the City of Chicago had been subjected to other mandatory orders by the District Court. It is factually incorrect, in the face of this case history, to distinguish *Gautreaux* on the grounds that *Gautreaux* involved only "injunctive relief in the first instance".

3. The lower Courts' orders requiring review of highway project approvals invalidly intrude upon the decision-making processes of state and federal administrative officials.

The District Court has given itself the right to review each of the highway projects in the I/M areas that the Secretary of Transportation certifies for approval on air quality, safety, or mass transit grounds. *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*, 533 F. Supp. at 885 (34a). The District Court's order will add one or more layers of review to the highway certification process in Pennsylvania—a process that already includes many years of decision-making by state and local officials.

In effect, the District Court has set itself up as the receiver for any federal highway funds allocated to the Philadelphia and Pittsburgh areas. The court will review all determinations by the United States Department of Transportation that a particular highway project is related to safety, air quality, or mass transit. The court will have the power to refuse approval of the project, if it feels that the project is not related to these areas.

The funds cutoff and this method of review will give the District Court total power to decide whether and what federal aid highway projects do and do not get funded in Pennsylvania. In so doing the Courts simply created a new judicial method of administering highway funds and short-circuited the normal process of highway planning and development that takes many years and extensive cooperation between federal, state, regional and local officials and the public. Highway planning and development cover the national and the state highway system, and are

based upon a number of professional judgments including such factors as safety considerations, industrial and commercial development, fiscal constraints and priorities, engineering considerations, existing and projected road conditions, mass transit alternatives, other transportation alternatives, transportation capacity, projected population, and vehicle ownership. This intrusion and expansion of judicial power are contrary to this Court's reasoning in *Rizzo v. Goode*, 423 U.S. 362 (1976), *Bell v. Wolfish*, 441 U.S. 520 (1979) and *Youngberg v. Romeo*, U.S. , 102 S.Ct. 2452 (1982), that, even in civil rights cases (which this case is not), federal courts should not substitute their own decisions for those of executive branch professionals and should not make unwarranted intrusions into the processes of federal, state and local governments. This Court should review this important question.

VI. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit in this case.

Respectfully submitted,
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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Actions
No. 76-2068

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR et al.

v.

COMMONWEALTH OF PENNSYLVANIA et al.
No. 77-619

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA et al.

MEMORANDUM AND ORDER

BECHTLE, J., January 22, 1982

These two consolidated cases arose under the Clean Air Act, as amended, 42 U.S.C. §7401, *et seq.* On August 29, 1978, the Commonwealth of Pennsylvania ("Common-

wealth") and two of its administrative agencies voluntarily entered into a consent decree with the United States of America ("United States") and the Delaware Valley Citizens' Council for Clean Air ("DVCCCA"). In that consent decree, the Commonwealth defendants agreed to establish an automobile emissions inspection and maintenance program ("I/M program") for the Philadelphia and Pittsburgh areas. On October 5, 1981, the Pennsylvania General Assembly enacted a statute prohibiting the expenditure of public funds for the establishment of the I/M program. Presently before the Court are the motion of the Commonwealth defendants for a stay and a modification of the consent decree and the motion of the DVCCCA to declare defendants in civil contempt and to establish sanctions, both filed as a result of the General Assembly's action.

I.

Section 110 of the Clean Air Act requires each state to submit a state implementation plan ("SIP") for the attainment and maintenance of national ambient air quality standards for each air quality control region in that state. 42 U.S.C. §7410. Originally, §110(a)(2)(G) of the Act provided that a state *could* include an I/M program in its SIP "to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards" if so desired. 42 U.S.C. §7410(a)(2)(G). On January 27, 1972, the Pennsylvania SIP was submitted to the United States Environmental Protection Agency ("EPA") for formal approval. 40 C.F.R. §52.2020(b). On April 13, 1973, Pennsylvania submitted for EPA approval a Transportation Control Plan for the Metropolitan Philadelphia and South-

west Pennsylvania Air Quality Control Regions as a revision to the Pennsylvania SIP.[1] 38 Fed. Reg. 10120 (1973). The Pennsylvania Transportation Control Plan included provisions for an I/M program in order to meet federal air quality control standards in the Philadelphia and Pittsburgh areas. On November 28, 1973, the EPA promulgated a revised Transportation Control Plan for the Metropolitan Philadelphia and Southwest Pennsylvania Air Quality Control Regions to correct certain deficiencies contained in the Pennsylvania plan pursuant to its rule-making authority under the Clean Air Act. 38 Fed. Reg. 32884 (1973). Pursuant to this revision, the Pennsylvania SIP required the Commonwealth to implement an I/M program for the Philadelphia and Pittsburgh areas by May 1, 1975. 40 C.F.R. §52.2038.[2]

The Commonwealth filed a petition to review the actions of the Administrator of the EPA in the promulgation of the revised Transportation Control Plan with the Third Circuit Court of Appeals pursuant to §307 (b) of the Clean Air Act, 42 U.S.C. §7607 (b). *Commonwealth of Pennsylvania v. EPA*, 500 F.2d 246, 249 (3d Cir. 1974). Inter-

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[1] The Pennsylvania portion of the Metropolitan Philadelphia Air Quality Control Region and the Southwest Pennsylvania Air Quality Control Region include counties not included within the scope of the consent decree. Although the difference does not affect the legal issues raised in our discussion, it has been preserved in our discussion for the sake of accuracy.

[2] The purpose of an I/M program is to reduce emissions for in-use vehicles by identifying vehicles that need emission control related maintenance and requiring that such maintenance be performed. 40 C.F.R. §52.2038. Three air pollutants—carbon monoxide, hydro carbons, and photo-chemical oxidants—are largely attributable to motor vehicle emissions.

estingly enough, the Commonwealth did not challenge the I/M program provisions in its petition for review. Rather, the Commonwealth challenged the validity of the EPA requirement mandating that air bleed retrofit devices be installed on all pre-1968 light-duty motor vehicles in the Metropolitan Philadelphia Air Quality Control Region and the Allegheny County portion of the Southwest Pennsylvania Air Quality Control Region. *See* 40 C.F.R. §52.2039. The Third Circuit, in reviewing the Administrator's actions, set aside the air bleed retrofit requirement for the Allegheny County portion of the Southwest Pennsylvania Air Quality Control Region and affirmed the validity of the remainder of the Pennsylvania Transportation Control Plan. 500 F.2d at 263.

The I/M program was never implemented by the Commonwealth. On June 29, 1976, DVCCCA instituted a citizen's action, pursuant to 42 U.S.C. §7604, against the Commonwealth of Pennsylvania, the Secretary of the Pennsylvania Department of Transportation ("PennDOT"), the Secretary of the Pennsylvania Department of Environmental Resources ("PennDER"), and the Administrator and Regional Administrator of the EPA to enforce the Pennsylvania SIP requirement for the implementation of an I/M program in the Philadelphia and Pittsburgh areas. On September 23, 1976, the EPA issued notices of violation to the Governor of Pennsylvania and the Secretary of PennDOT, pursuant to §113(a)(1) of the Clean Air Act, as amended, 42 U.S.C. §7413(a)(1), because of Pennsylvania's failure to implement the I/M program by May 1, 1975. On February 18, 1977, the United States instituted its own suit against the Commonwealth of Pennsylvania and certain of its departments and officers, pursuant to §113(b) of the Clean Air Act, as amended, 42 U.S.C.

§7413(b), to enforce the Pennsylvania SIP requiring the implementation of an I/M program.[3]

Meanwhile, on August 7, 1977, Congress passed the Clean Air Act Amendment of 1977, Pub. L. 95-95, tit. I-IV, 91 Stat. 685. This amendment added a new Part D to the Clean Air Act requiring states to submit revised SIPs for areas which had not yet attained the national ambient air quality standards. 42 U.S.C. §7501 *et seq.* These revised SIPs must meet specific requirements outlined in Part D of the Act and must provide for attainment of national ambient air quality standards by December 31, 1982. If a state cannot attain certain air quality standards in certain areas by December 31, 1982, §172(a)(2) of the Act allows the EPA to grant an extension of the attainment deadline to December 31, 1987. 42 U.S.C. §7502(a)(2). In the event that such an extension is granted, a state is required by §172(b)(11) to submit "a specific schedule for implementation of a vehicle emission control inspection and maintenance program" in any area with an extended attainment deadline. 42 U.S.C. §7502(b)(11).

On August 29, 1978, after extensive negotiations, the Commonwealth of Pennsylvania, and two of its departments, PennDOT and PennDER, voluntarily entered into a consent decree with both the DVCCCA and the United States by agreeing to implement an I/M program for ten counties in the Philadelphia and Pittsburgh areas by August 1, 1980.[4] Under the consent decree, the "Philadelphia

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[3] After the United States filed its own action against the Commonwealth and its agencies, DVCCCA dropped the Administrator and Regional Administrator as defendants in its suit.

[4] Commonwealth defendants first agreed to seek enabling legislation from the Pennsylvania General Assembly for a franchise system in implementing an I/M program for the Philadelphia and

Area" has been defined as Philadelphia, Bucks, Montgomery, Chester and Delaware Counties, paragraph 3(F) of the Consent Decree; while the "Pittsburgh Area" has

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Pittsburgh areas. However, as agreed in the consent decree, a private garage system would be implemented instead in carrying forth the implementation of an I/M program in the event that the enabling legislation for a franchise system was not enacted by the Pennsylvania General Assembly on or before July 1, 1979. The enabling legislation for a franchise system was never enacted by the Pennsylvania General Assembly. The authority of defendants to enter into the consent decree seems clear. In 1972, the Pennsylvania General Assembly passed an amendment to the Vehicle Code which authorized PennDOT to establish an I/M program:

> Section 834. Official Inspections.—
>
> (a) Every owner of a motor vehicle (including a commercial motor vehicle, motor bus, motor omnibus, truck tractor, trailer, or semi-trailer having a chassis and body weight of less than one thousand (1000) pounds, or bicycle with motor attached, or fertilizer trailer), being operated in this Commonwealth, shall submit such motor vehicle to such inspection of its mechanism and equipment as may be designated by the secretary, *including such emission control systems and devices for which the Secretary of Transportation, in consultation with the Secretary of Environmental Resources, has adopted inspection procedure and requirements which shall, to the extent possible and practical, be consistent with the requirements of the "Clean Air Act" (77 Stat. 392, 42 U.S.C. 1857) and any amendments and supplements thereto. These requirements shall not apply within ninety (90) days after they are adopted, shall not be changed oftener than once a year and shall apply only to those motor vehicles as are required by Federal law or regulation to be equipped with such emission control systems and devices. The inspection of such devices and systems shall commence on the first day of the inspection periods (1) and (2) following the adoption of such standards by the secretary:*

been defined as Allegheny, Beaver, Butler, Westmoreland and Washington Counties, paragraph 3(G) of the Consent Decree. On March 7, 1980, the Court approved a modification of the August 29, 1978 consent decree which postponed the date of implementation to May 1, 1981. On May 20, 1980, the EPA granted Pennsylvania's extension requests for the Philadelphia, Pittsburgh, Allentown-

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Provided, however, That the Secretary may provide that the inspection of such devices and systems may commence on the first day of the inspection period next following.

. . .

Act of June 16, 1972, No. 154, §1, 1972 Pa. Laws 480 (formerly codified at Pa. Stat. Ann. tit. 75, §834). The Pennsylvania General Assembly later passed a new vehicle code, effective July 1, 1977, which amended the old vehicle code by revising, compiling and codifying provisions relating to vehicles and pedestrians. Act of June 17, 1976, No. 81, §1, 1976 Pa. Laws 162 (presently codified at 75 Pa. C.S.A. §§101-8122). This enactment specifically repealed the old vehicle code, Act of April 29, 1959, No. 32, 1959 Pa. Laws 58, which had been amended in 1972. Act of June 17, 1976, No. 81, §7(a). Pursuant to the recodification, this Court has concluded that PennDOT has retained the authority to implement an I/M program as part of its broadly defined power to "establish a system of semi-annual inspection of vehicles registered in this Commonwealth." *See* 75 Pa. C.S.A. §4702(a). This retained power to implement an I/M program can also be implied from 75 Pa. C.S.A. §§4531, 4701-4702, 6103, and the fact that the General Assembly has never expressly revoked the authority of PennDOT to establish such a program. Nevertheless, the authority of PennDOT to establish such an I/M program is presently being challenged in *Burd v. Commonwealth of Pennsylvania Department of Transportation*, No. 1506 C.D. 1981 (Pa. Cmmwlth. Ct.) and *Scanlon v. Commonwealth of Pennsylvania Department of Transportation*, No. 1762 C.D. 1981 (Pa. Cmmwlth. Ct.) before the Pennsylvania Commonwealth Court.

Bethlehem-Easton, and Scranton-Wilkes-Barre areas pursuant to §172(a)(2) and approved the submitted revised SIP which established an I/M program for these areas. 42 Fed. Reg. 33607 (1980).[5] On May 20, 1981, the Court denied the Commonwealth's motion for a further modification and postponement of the implementation deadline and ordered that the I/M program commence operations "without further delay." *Memorandum and Order* (May 20, 1981). In its order, the Court declared the Commonwealth to be in violation of the consent decree and directed the Commonwealth to file, by June 1, 1981, a proposed plan for the immediate implementation of the I/M program in the Philadelphia and Pittsburgh areas. On June 16, 1981, the Court denied the Commonwealth's motion for reconsideration and approved a Court modified version of the Commonwealth's Proposed Emission Inspection and Maintenance Program I to commence operations on May 1, 1982. *Memorandum and Order* (June 16, 1981).

Following the Court's decision in June, 1981, the Pennsylvania General Assembly passed House Bill No. 456, §2 ("H.B. 456"), which prohibited the expenditure of state funds by the executive branch for the implementation of the I/M program. On July 10, 1981, the Governor of Pennsylvania vetoed H.B. 456 and returned it to the

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[5] The I/M program submitted by the Commonwealth, and subsequently approved by the EPA, incorporated the provisions of the August 29, 1978 consent decree with respect to the Philadelphia and Pittsburgh areas. Moreover, the Commonwealth also agreed to apply the provisions of the consent decree to the Allentown-Bethlehem-Easton and Scranton-Wilkes-Barre areas. This case presently before the Court only involves the issue of the enforcement of the consent decree with respect to the Philadelphia and Pittsburgh areas as defined by the consent decree.

General Assembly. Nevertheless, on October 5, 1981, the General Assembly overrode the Governor's veto and enacted H.B. 456 into law as an amendment to the Administrative Code of 1929. Section 2 of H.B. 456 provides:

> Section 2013. *Prohibition on Expenditures for Emission Inspection Program*
>
> Neither the department nor any other department or agency of the Executive Branch of State Government shall expend any public funds for the establishment and administration of any system for the periodic inspection of emissions or emission system of motor vehicles.

Act of October 5, 1981, No. 99, §2, 1981 Pa. Legis. Serv. 312 (to be codified at Pa. Stat. Ann. tit. 71, §523). PennDOT and the executive branch immediately ceased operations in the implementation of the I/M program following the passage of this law. Nevertheless, on October 10, 1981, final regulations pertaining to the standards for the emission analyzers to be purchased by the private garage owners wishing to participate in the I/M program were published in the Pennsylvania Bulletin. 11 Pa. Bull. 3519 (Oct. 10, 1981). Moreover, $36,118,000.00 had previously been appropriated without restriction by the General Assembly to PennDOT "for the salaries, wages and all necessary expenses for the administration of the traffic safety program and the administration and operation of the operator and vehicle registration programs." The current law prohibits the expenditure of these appropriated funds for the implementation of the I/M program agreed to by the Commonwealth when it entered into the consent decree. On December 2, 1981, a notice of deficiency was issued to the Commonwealth by the EPA because of the

lack of funding assurances required by sections 172 (b) (7) and 110 (a) (2) (F) under the Clean Air Act due to the passage of H.B. 456. 46 Fed. Reg. 58593 (1981).

II.

Presently before the Court are two motions: (1) the motion of state defendants, Commonwealth of Pennsylvania and PennDOT, for a stay and a modification of the consent decree, and (2) the motion of DVCCCA to declare the defendants in civil contempt and to establish sanctions. In addition, in response to the Court's Order of October 20, 1981, the United States has filed a brief taking the position that defendants' motion for a stay and a modification should be denied and that the Court should postpone a ruling on the motion for civil contempt and defer to the EPA for the initiation of administrative procedures and remedies available under the Clean Air Act, 42 U.S.C. §7401, *et seq.* We will now address each parties' contentions.

A.

The Commonwealth urges the Court to stay further implementation of the I/M program until such time that the Pennsylvania legislature decides to fund the program. Defendants argue that since H.B. 456 prohibits the expenditure of public funds for the implementation of an I/M program, the executive branch is now disabled from complying with the requirements of the consent decree and the Court's orders despite its continued willingness to do so. *See generally Shapp v. Sloan*, 480 Pa. 449, 391 A.2d 595 (1978). Moreover, defendants argue that the legislature's passage of H.B. 456 constitutes "changed circumstances" which warrant a stay or modification of the consent decree.

Paragraph 13 of the August 29, 1978 consent decree specifically provides:

> Jurisdiction is retained by this Court for the purpose of enabling any party to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for carrying out of this Consent Decree, *for the modification or termination of any of the provisions herein upon a showing of changed circumstances and good cause*, or for the enforcement of compliance therewith and the punishment of violations thereof. (Emphasis added.)

Indeed, even in the absence of such a clause, a federal district court may, in its discretion, modify a consent decree in the interests of justice as reflected by changed circumstances. *Mayberry v. Maroney*, 529 F.2d 332, 335 (3d Cir. 1976). Nevertheless, in *United States v. Swift & Co.*, 286 U.S. 106 (1932), the Supreme Court stated that a modification of a consent decree would only be appropriate where the decree "has been turned through changing circumstances into an instrument of wrong," *id.* at 115; and that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed by years of litigation with the consent of all concerned." *Id.* at 119.

A party should not be permitted, however, to obtain a modification of a consent decree because of changed circumstances of its own creation. *See Mayberry v. Maroney*, 558 F.2d 1159, 1164 (3d Cir. 1977). This is especially true where the change in circumstances does not render continued compliance with the consent decree oppressive, but merely a party's act disabling itself from carrying out its part of its own judicially sanctioned agreement. Such

"changed circumstances" simply do not fall within the realm of those recognized by courts in the past. *See e.g. System Federation v. Wright*, 364 U.S. 647, 648 (1961) (change in Railway Labor Act to permit union shops justified modification of a consent decree which enjoined discrimination against non-union employees); *Jordan v. School District*, 548 F.2d 117, 122 (3d Cir. 1977) (modification of consent decree justified where subsequent Supreme Court decision gave students greater rights than provided for in decree); *Theriault v. Smith*, 523 F.2d 601 (1st Cir. 1975) (vacation of consent decree based on interpretation of law that is rendered incorrect by later Supreme Court decision). As the Third Circuit has stated, "[t]here must be an end to litigation someday, and such free, calculated, deliberate choices are not to be relieved from." *Mayberry v. Maroney, supra*, at 1164. In this case, since there has been no change in the Clean Air Act or the caselaw upon which the present consent decree rests, the motion of the Commonwealth will be denied.

B.

Next, the United States contends that the Court should defer to the EPA to allow for the initiation of administrative procedures and remedies available to the EPA under the Clean Air Act where, as here, a SIP is deficient, before deciding the questions of constitutionality and contempt raised by the Pennsylvania General Assembly's passage of H.B. 456 prohibiting the expenditure of public funds for the implementation of the I/M program. Pursuant to the Act, the EPA can impose a moratorium on all future construction or modification of major stationary sources of pollution, *see* 42 U.S.C. §§7410(a) (2) (I) and 7503(4), and withhold future Clean Air Act planning and pollution

control funds. *See* 42 U.S.C. §7506(b). *See generally United States v. Ohio Department of Highway Safety*, 635 F.2d 1195, 1202 (6th Cir. 1980), *cert. denied*, 101 S.Ct. 2031 (1981). Nevertheless, the United States concedes that "[i]n the event the Commonwealth does not recommence implementation of the I/M program as a result of the administrative action taken by EPA, this Court retains jurisdiction under the Consent Decree and Orders to consider appropriate remedies for noncompliance." *Memorandum of the United States in Response to Court's Order of October 20, 1981*, at 10. Thus, the United States argues that the Court should defer to the EPA because of the traditional deference accorded to an agency in its interpretation of the statute which it administers, *see Chrysler Corp. v. Environmental Protection Agency*, 600 F.2d 904, 913 (D.C. Cir. 1979) and because the EPA has primary jurisdiction to take action which may obviate the necessity for judicial action. *See Far East Coast Conference v. United States*, 342 U.S. 570, 574-575 (1952); *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 63-64 (1956). Thus, the United States essentially contests the Court's present jurisdiction over this dispute.

After considering these views, the Court holds that it is not required to defer to the EPA before taking action on the motions presently pending and that it has jurisdiction over the present dispute. First, the issues raised concern a consent decree which was voluntarily entered by the Commonwealth and two of its agencies after a citizens' action was filed in the district court by the DVCCCA pursuant to §304(a) of the Clean Air Act, 42 U.S.C. §7604(a), and an enforcement action was filed by the United States pursuant to §113(b), 42 U.S.C. §7413(b).

The notion of primary jurisdiction does not apply where the parties have already properly resorted to the remedies available in the federal district court and have entered a consent decree in settlement of their dispute. Of course, judicial action to enforce the consent decree does not prevent the EPA from taking contemporaneous administrative action, where authorized, to enforce compliance. Nevertheless, where, as here, the parties are already properly, lawfully and voluntarily before the Court as parties to the consent decree, no purpose would be served by deferring to an administrative agency. Accordingly, the Court declines to adopt the suggestion of the United States.

C.

The Court now turns to the motion of plaintiff DVCCCA to declare the defendants in civil contempt and to establish sanctions. DVCCCA's motion essentially seeks four items of relief: (1) a declaration that defendants are in civil contempt for failure to comply with the modified consent decree and the Court's orders of May 20 and June 16, 1981; (2) a declaration that §2 of H.B. 456 is unconstitutional and without effect; (3) an order directing defendants forthwith to comply with the modified consent decree and the Court's orders; and (4) the establishment of coercive and compensatory civil penalties, primarily consisting of fines of $50,000.00 per day for continued violations. The first two items of relief sought raise substantive legal questions. The remaining items are merely matters of remedy which must be addressed only if the Court first holds that defendants are in civil contempt, and then only to determine whether they constitute appropriate relief. Therefore, the Court will begin by addressing DVCCCA's first two items of requested relief.

1. *Constitutionality of H.B. 456.*

Plaintiff DVCCCA argues that H.B. 456 violates the Supremacy Clause of the Federal Constitution, U. S. Const., art. VI, cl. 2, in two respects: first, by having the effect of nullifying the Court's orders and the consent decree; and secondly, by directly conflicting with the requirements of the Clean Air Act, 42 U.S.C. §7401, *et seq.*[8] Upon full consideration, the Court has concluded that H.B. 456 cannot be declared unconstitutional on either ground.

a. Interference with a Consent Decree.

It is well settled that a state law which purports to nullify or prevent compliance with a federal judicial decree is unconstitutional and without effect. *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 692-696 (1976); *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958); *Ableman v. Booth*, 62 U.S. (21 How.) 506, 523-524 (1858); *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809). Moreover, by preventing the Commonwealth defendants from fulfilling their obligations under the consent decree, H.B. 456 clearly interferes with the realization of a federal judicial decree. Nevertheless, there are serious limits not reached by the cases cited above on the power of the federal government to require action on the part of state government. The Supreme Court has held that Congress, in enacting legislation otherwise within its authority, may not impose burdens on states which impair essential attributes of state sovereignty. *National League of Cities v. Usery*, 426 U.S.

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[8] The Court also raised *sua sponte* the issue whether H.B. 456 constitutes an impairment of contract proscribed by article I, §10 of the Federal Constitution. *See* note 9 *infra*.

833 (1976). This principle is not only embodied in the language of the Tenth Amendment, but is also implicit in the concept of federalism underlying the structure of our government.

This concept and its effect on the power of a federal court to interfere with the appropriation decisions of a state legislature were recently discussed in *New York State Association for Retarded Children v. Carey*, 637 F.2d 162 (2d Cir. 1980). In *Carey*, a consent decree was entered in which Governor Carey agreed to make specific budget requests to the state legislature for a Review Panel designed to improve conditions for mentally retarded residents at the Willowbrook Developmental Center on Staten Island. The state legislature refused to provide the necessary funding for the Review Panel. Reversing a district court order holding Governor Carey to be in contempt, the Second Circuit stated:

> We have previously held, and repeat here, that a federal district court ought not to put itself "in the difficult position of trying to enforce a direct order . . . to raise and allocate large sums of money . . . steps traditionally left to appropriate executive and legislative bodies responsible to the voters." . . . In the face of constitutional violations at a state institution, a federal court can order the state either to take the steps necessary to rectify the violations or to close the institution. Thus, a state cannot avoid the obligation of correcting the constitutional violations of its institutions simply by pleading fiscal inability. . . . But that remedy leaves the question of the expenditure of state funds in the hands of citizens of the state, not in the hands of federal judges. . . . Those organizations and citizens who are properly concerned with the

> supervision of the conditions at Willowbrook must seek to convince their representatives in the New York State Senate and Assembly, who control the purse-strings and determine the priorities for the expenditure of State money, that funds for the Review Panel should be provided.

631 F.2d at 165-66 (citations omitted). Although *Carey* did not so hold, the considerations set forth in as well as those discussed in the cases relied upon in the next section, lead the Court to conclude that a federal court on the present record lacks the power under our federalist system to countermand the decision of a state legislature not to expend state funds on the establishment of an I/M program.[7]

b. Conflict with the Clean Air Act.

Plaintiff DVCCCA also claims that H.B. 456 is unconstitutional because it conflicts directly with the Clean Air Act, as amended. In particular, plaintiff DVCCCA relies upon those provisions of the Clean Air Act which require that a SIP provide for an I/M program where necessary. *See* 42 U.S.C. §§7410(b)(2)(G), 7502(b)(11)(B). Plaintiff argues that, since an I/M program is required under the Act, and H.B. 456 effectively prohibits the establishment of such a program, H.B. 456 is unconstitutional. The Courts of Appeals of several circuits have considered this argument, however, and the majority have concluded that the Clean Air Act does not

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[7] The Court expresses no opinions as to whether there may be other programs which a state may be required by the Constitution or federal law to maintain and fund. Our holding in this regard is limited to the I/M program as embodied in the consent decree and contemplated by the Clean Air Act.

require states to establish and fund I/M programs or authorize the EPA to so require. *See Brown v. EPA (Brown II)*, 566 F.2d 665, 668-672 (9th Cir. 1977); *Maryland v. EPA*, 530 F.2d 215, 227-228 (4th Cir. 1975), *vacated* 421 U.S. 99 (1977); *District of Columbia v. Train*, 521 F.2d 971, 983-988 (D.C. Cir. 1975), *vacated*, 431 U.S. 99 (1977); *Brown v. EPA (Brown I)*, 521 F.2d 827, 832-837 (9th Cir. 1975), *vacated*, 431 U.S. 99 (1977). Indeed, those same opinions suggest that Congress lacks the power to do so because of the Tenth Amendment and principles of federalism. *See Brown II, supra*, at 672-673; *Maryland v. EPA, supra*, at 224-226; *District of Columbia v. Train, supra*, at 990-995; *Brown I, supra*, at 837-842. The Court agrees with the cases cited, and accordingly concludes that H.B. 456 does not conflict with the Clean Air Act, as amended.

Plaintiff DVCCCA relies heavily on the decision of the Court of Appeals for the Sixth Circuit in *United States v. Ohio Department of Highway Safety*, 635 F.2d 1195 (6th Cir. 1980). A close reading of the facts of the case, however, show that the case is distinguishable from the case at bar. In *Ohio Department of Highway Safety*, two counties established emission inspection programs pursuant to federal regulations. Contrary to federal regulations, however, the state refused to deny registration to vehicles that failed the inspection. The only queston before the Court of Appeals was whether the state could be compelled to deny registration to noncomplying vehicles. In holding that it could, the court found no constitutional barrier in the Tenth Amendment. As the court noted,

> The regulation which EPA seeks to enforce does not require the State to adopt legislation, establish new regulatory agencies or change its procedures

> for registering vehicles. It merely requires the State to deny use of state-owned facilities to those whose use adds to the national problem of pollution. Further it does not appear that compliance will entail large expenditures by the State.

635 F.2d at 1205. Thus, unlike the present case, *Ohio Department of Traffic Safety* did not involve state legislative attempts to control the institution of the inspection program.

Moreover, the Court does not believe that it is bound by the suggestion made by the Third Circuit Court of Appeals in *Commonwealth of Pennsylvania v. EPA*, 500 F.2d 246, 259-263 (3d Cir. 1974), that the federal government could constitutionally require the states to pass legislation establishing a regulatory program to enforce the Clean Air Act. In the first place, the court was not faced with a legislative refusal to comply. Moreover, the court was without the benefit of the Supreme Court's subsequent decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), which was the first Supreme Court decision to hold on the merits that the Tenth Amendment carried substantive force.

For these reasons, the Court holds that H.B. 456 cannot be declared unconstitutional because of the Tenth Amendment prohibitions on the reach of the Commerce Clause and legislation enacted pursuant to that provision.[8]

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[8] At the November 20, 1981 hearing, the Court raised *sua sponte* the question whether H.B. 456 constituted an unconstitutional impairment of the contract embodied in the consent decree, and requested supplemental briefs on that issue. After thorough consideration, the Court has concluded that H.B. 456 cannot be invalidated on this ground. Assuming *arguendo* that the con-

2. *Motion for Civil Contempt*

a. Defendants' Conduct as Contempt.

It is well established that a consent decree, although negotiated by the parties, is a judicial act. *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932). A party violating a consent decree is therefore subject to the powers by which a court protects its judgments, including, most notably, the power of contempt under 18 U.S.C. §401 (1976). *See Interdynamics, Inc. v. Wolf*, 653 F.2d 93, 96-97 (3d Cir. 1981). Punishment by fine or imprisonment may also be imposed where a court finds that a party is in civil contempt in order to coerce the recalcitrant party into compliance w[illegible]. the Court's orders. *Cromaglass Corporation v. Ferm*, 500 F.2d 601, 604 (3d Cir. 1974). Moreover, a broad range of equitable powers are available to a court to enforce and effectuate its orders and judgments. *United States v. City of Detroit*, 476 F. Supp. 512, 520 (E.D. Mich. 1979).

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tractual nature of a consent decree as established in the caselaw, *see e.g., United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975), is sufficient to receive the protection of the Contract Clause, the Court would nevertheless be compelled to conclude from the radical effect of H.B. 456 that the legislature's action represents not an impairment of contract but an election to breach, releasing the Commonwealth defendants from their obligations and entitling the plaintiffs to a remedy. *See Hays v. Port of Seattle*, 251 U.S. 233 (1920); Hale, *The Supreme Court and the Contract Clause: II*, 57 Harv. L. Rev. 621, 638 (1944). In this case, where there is clearly no adequate remedy at law and specific performance would be barred by the same considerations of federalism discussed in the text, *supra*, the Court would fashion the same remedy for the breach as that chosen as its sanction for the defendants' contempt. *See infra*.

In this case, the Commonwealth of Pennsylvania with a full range of technical and professional guidance and representation at its disposal entered, after considerable opportunity for deliberation and negotiation, into a consent decree in which it agreed to implement an I/M program in the Philadelphia and Pittsburgh areas under the terms and conditions of that decree. On May 20, 1981, the Court denied the Commonwealth's motion for a further modification and postponement of the implementation date and ordered that the program commence "without further delay." *Memorandum and Order* (May 20, 1981). On June 16, 1981, the Court approved a modified plan submitted by the Commonwealth for the implementation of the I/M program to commence on May 1, 1982. *Memorandum and Order* (June 16, 1981). Since then, the Pennsylvania legislature has enacted H.B. 456 which prohibits state expenditures for the implementation of the I/M program as previously promulgated and implemented by PennDOT pursuant to its legislatively conferred authority. *See* note 4, *supra.* As a result, the Commonwealth and its agencies are no longer fulfilling their obligations under the consent decree.

It is well settled that civil contempt consists of a party's failure to comply with a judicial order where the party has knowledge of the order and the ability to comply. *See United States Steel Corp. v. United Mine Workers of America*, 393 F. Supp. 942, 947 (W.D. Pa. 1975). It is not necessary to establish that the noncomplying party acted willfully. *N.L.R.B. v. Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 428 F.2d 994, 1001 (2d Cir. 1970). In this case, there is no doubt that the Commonwealth defendants are no longer complying with the consent de-

cree. The defendants themselves admitted, that with the passage of H.B. 456, they had discontinued all efforts to implement an I/M program, save for publishing regulations regarding the analyzers to be used. Similarly, there is no doubt that the Commonwealth defendants had knowledge of the consent decree. Finally, it is also clear that the Commonwealth has the ability to comply with the decree in the sense necessary to hold a party in civil contempt. That the Commonwealth has sufficient resources of money and manpower to carry out the consent decree is demonstrated by the fact that the Commonwealth, through both legislative authorization and administrative action, approved and funded the implementation of an I/M program for several years prior to the enactment of H.B. 456. Thus, it is clear that it is and always has been physically, practically, and financially able to comply with the consent decree. Nor is there any legal barrier to the implementation of the consent decree other than H.B. 456. In this regard, it is important to note that H.B. 456 is not a legal disability imposed upon the Commonwealth from without; rather, it is a disability imposed from within the sovereignty itself reflecting a decision of the legislative arm of that government that the I/M program shall not go forward as agreed to by the executive arm even though that very executive arm had previously been lawfully empowered to enter into the program by that same legislative arm.

In this regard, the Court cannot accept the Commonwealth defendants' argument that for the purposes of the present proceeding the conduct of the state's executive branch should be considered separately from that of its legislative branch. At least with regard to the establishment of inspection programs, the threshold power in Penn-

sylvania over the creation and scope of such programs is exercised not by the executive, but by the legislature. It was pursuant to the exercise of such authority that PennDOT was and still is authorized to promulgate regulations necessary to establish inspection programs complying with the Clean Air Act. *See* note 4, *supra*. In the same manner, in signing the consent decree in this case, the Commonwealth defendants were only exercising the authority granted to them by the legislature. However, through the passage of the funding restrictions imposed by H.B. 456, the Commonwealth defendants have been prohibited, by legislative directive, from implementing the same I/M program that they had previously been urged and authorized to enter into in the form of the consent decree. In the area covered by the consent decree, the executive branch merely is obligated to carry forward the will of the sovereign as that will has been previously expressed by the legislature. It is of no legal significance that individual members of the executive branch have the subjective desire to fulfill each and every one of their undertakings in the decree. It is of more importance to the Court, in determining whether the Commonwealth defendants are now in contempt, to determine what the conduct of the defendants is in light of the laws those defendants exist to implement, including H.B. 456. As a result of the passage of H.B. 456, the Commonwealth (by its legislative arm) has prevented itself (through its executive arm) from being able to comply with the provisions of the consent decree that it once properly and lawfully entered into. The Commonwealth of Pennsylvania and its two agencies are party defendants. The fact that these defendants that are before the Court have been prevented by a part of the Commonwealth that is not before the Court from carrying

out the decree does not insulate the parties before the Court from the consequences of a self-imposed failure to fulfill the obligations of the judgment that is before the Court and represented by the decree. Accordingly, the Court finds that the Commonwealth of Pennsylvania and the other Commonwealth defendants that are part of that Commonwealth are in civil contempt for failing to comply with the judgment of the Court.[9]

b. The Appropriate Remedy.

Having determined the Commonwealth defendants to be in civil contempt of the consent decree, the Court must decide upon an appropriate remedy, bearing in mind that

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[9] Defendants rely heavily on *New York State Association for Retarded Children v. Carey*, 631 F.2d 162 (2d Cir. 1980) for the proposition that a federal court cannot hold a state defendant in civil contempt when the state legislature refuses to appropriate monies for a program mandated by a consent decree. The *Carey* case is readily distinguishable, however, from the facts of our case. In *Carey*, the Governor of New York had agreed to seek state funding for a Review Panel for the purpose of improving conditions at a state developmental center for mentally retarded residents. In that case, the execution branch had never been authorized by the state legislature to pursue such a program. The facts in our case are directly opposite to those of *Carey*. In our case, the state legislature had previously authorized the executive branch, here, PennDOT, to implement an I/M program in conformance with the federal Clean Air Act. *See* note 4, *supra*. Moreover, the program had been funded annually by the state legislature until the passage of H.B. 456 in October, 1981. Therefore, the state legislature has attempted to revoke the authority of the executive branch to implement an I/M program by placing restrictions on state appropriations. The existence of prior legislative approval and funding for the consent decree distinguish this case from *Carey*.

a sanction for civil contempt should be designed either to coerce the contumacious party into compliance, or to compensate the aggrieved party for loss, if any, or for both purposes. *Latrobe Steel Co. v. United Steelworkers of America, AFL-CIO*, 545 F.2d 1336, 1344 (3d Cir. 1976). Moreover, in fashioning a coercive remedy, the district court, sitting in equity, is vested with wide discretion. *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979). *See also United States v. City of Detroit*, 476 F. Supp. 512 (E.D. Mich. 1979) (appointment of receiver for Detroit waste water system after court declaration that city was in violation of a consent decree). In addition, the remedy chosen in the present case should avoid undue interference with essential elements of state sovereignty for the reasons discussed earlier in this opinion.

A remedy that appears to meet the present need is suggested by the Clean Air Act itself. In the 1977 amendments to the Act, Congress sought to induce states to establish I/M programs by including provisions which, if invoked, could lead to the termination of certain related federal benefits. Most important among these federal funds are those for highway construction. It was for this purpose that Congress enacted, as one means of inducement, section 176(a) of the Act, which provides in relevant part:

> (a) The Administrator shall not approve any projects or award any grants authorized by this chapter and *the Secretary of Transportation shall not approve any projects or award any grants under Title 23 other than for safety, mass transit, or transportation improvement projects related to air quality improve-*

ment or maintenance, in any air quality control region—

(1) in which any national primary ambient air quality standard has not been attained.

(2) where transportation control measures are necessary for the attainment of such standard, and

(3) *where the Administrator finds after July 1, 1979, that the Governor has not submitted an implementation plan which considers each of the elements required by section 7502 of this title or that reasonable efforts toward submitting such an implementation plan are not being made (or, after July 1, 1982, in the case of an implementation plan revision required under section 7502 of this title to be submitted before July 1, 1982).*

42 U.S.C. §7506 (emphasis added). The coercive purpose of section 176(a) is clear from the legislative history of the 1977 amendments.

In reporting on a committee proposal, the Committee on Interstate and Foreign Commerce made the following statement:

Once the I/M program has become part of an "applicable implementation plan" (whether by State adoption and EPA approval or by promulgation of the Administrator), then enforcement and implementation can occur in several possible ways. More preferably, the State may agree voluntarily to implement and enforce the I/M program. Other options include (1) *inducing the State to do so, by offering grants under section 210 of the Act or by withholding part of a State program grant under section 105 of the Act or by such other means as have been held permissible*

by the Court in District of Columbia v. Train, [521 F.2d 971 (D.C. Cir. 1975)]; (2) delegating authority to general purpose local governments to implement and enforce the program under section 303 of the bill; (3) if feasible, providing for Federal implementation and enforcement of the program (including Federal licensing of private I/M centers, or turnkey operations, and imposing Federal inspection fees); or (4) seeking injunctive relief under section 113 of the Act; or (5) a combination of the above. It should be noted that the various mechanisms for obtaining voluntary compliance (e.g., withholding of program grants) are intended to provide alternatives to enforcement actions under section 113, thus allowing the Administrator to avoid compulsion where implementation of the necessary actions can be assured by other means.

H. Rep. No. 95-294, *reprinted in* [1977] U.S. Code Cong. & Admin. News at 1077, 1369-70. *See also District of Columbia v. Train,* 521 F.2d 971, 993 n. 26 (D.C. Cir. 1975) ("The federal government traditionally obtains state cooperation and participation in federal regulatory programs by offering the states a sufficiently attractive incentive or by threatening to withdraw a federal benefit they are presently receiving."). Moreover, in discussing the Senate version of the 1977 amendments, Senator Muskie stated:

> In view of the time that has elapsed since enactment of the 1970 amendments, it is regrettable that legal uncertainties have held up implementation of inspection and maintenance programs and other necessary measures. EPA's authority to promulgate transportation control measures requiring the States to take

action, where necessary, and to compel compliance with such requirements, where necessary, is clear in sections 110 and 113 of existing law. Although this is a delicate area of Federal-State relations, it is appropriate to require affirmative State action in the field of transportation controls where this proves necessary to protect the public health.

By providing roads and highways that facilitate and encourage extensive use of motor vehicles, the States have played a substantial, if unintentional role in causing the pollution problems that result. And, as a practical matter, State and local governments are in a better position than EPA to attack those problems, which involve millions of motor vehicles, through inspection and maintenance programs and similar measures.

In addition, the scheme contemplated by the act is a reasonable approach to this problem, one that is designed to involve the least possible intrusion into State affairs consistent with the task that is necessary. The 1970 amendments were carefully drawn to provide the States with maximum flexibility and discretion in developing plans under section 110 of the act, so long as the essential objective—attainment and maintenance of the national ambient air quality standards—was met. Thus, the States may make the basic policy choices, if they wish in developing inspection and maintenance programs and similar measures: Federal promulgation is required only if the States default.

For all these reasons, I hope that further progress in this area will not be stalemated by legal uncertain-

ties, and I urge EPA to continue to press for implementation of the necessary programs.

It should be noted that the various mechanisms provided to induce voluntary State implementation of approved or promulgated measures, such as cut-offs of highway funds for failure to implement such measures, are intended to provide alternatives to injunctive actions under section 113, thus allowing the Administrator to avoid compulsion where he believes that implementation can be assured by other means.

123 Cong. Rec. §9168 (1977) (emphasis added).

With the foregoing in mind, under the auspices of the Court's inherent equitable process, the Court will enjoin the United States Secretary of Transportation from approving any projects or awarding any grants to the Commonwealth of Pennsylvania for highway projects in the Philadelphia and Pittsburgh areas as defined in the consent decree, other than those grants required for safety, mass transit, or transportation improvement projects related to air quality improvement or maintenance in those same Philadelphia and Pittsburgh areas. In refusing to comply with the provisions of the consent decree through the passage of H.B. 456 which prohibits the expenditure of state funds for the implementation of an I/M program, Pennsylvania has indirectly but with calculated effectiveness rescinded the state SIP revisions submitted for the Philadelphia and Pittsburgh non-attainment areas as required under 42 U.S.C. §7502. For this reason, Pennsylvania's adoption of H.B. 456 is tantamount to no SIP revision having ever been submitted before, which would, thus, trigger the invocation of the sanctions prescribed by Con-

gress in 42 U.S.C. §7506(a).[10] Moreover, this remedy, under all the circumstances, serves to promote the underlying goal of the consent decree and the philosophies behind the enactment of the Clean Air Act and subsequent amendments since the further construction of highways encourages the further use of motor vehicles which thereby results in an increase in air pollutants and a decrease in air quality. Finally, the aforementioned remedy will not interfere with state sovereignty since it permits the state's action to stand as long as the state chooses to remain adamant in its refusal to establish the I/M program it agreed to, while it also encourages the state to reconsider its position and comply with the consent decree.[11] For these reasons the Court is of the view that a cut-off of federal highway funds serves all of the Court's remedial objectives.

III.

To summarize, the enactment of H.B. 456 by the Pennsylvania legislature does not constitute a change in circumstances warranting a stay of the consent decree, nor does it require the Court to defer to the EPA for the resolution of its effects. At the same time, the Court has concluded that there is nothing in the Federal Constitution which prohibits the state from enacting such a measure. Nevertheless, since the effect of H.B. 456 is that the Commonwealth defendants are no longer complying with the

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[10] Funding restrictions have already been imposed with respect to federal highway monies in California and Kentucky due to the states' failure to submit adequate SIP revisions for non-attainment areas as required under §172 of the Clean Air Act. 45 Fed. Reg. 81746 (Dec. 12, 1980).

[11] *Cf.* 5A *Corbin on Contracts* §1138, at 106-107 (1964) (remedy for breach of contract).

provisions of the consent decree of which they are parties, the Court holds that the defendants are in civil contempt. As a remedy, and as applied to the Philadelphia and Pittsburgh Areas covered by the decree, the Secretary of the United States Department of Transportation will be enjoined from approving and awarding grants of federal highway funds unless they are for safety, mass transit, or transportation projects related to air quality improvement and maintenance.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Actions
No. 76-2068

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, *et al.*

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*
No. 77-619

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*

ORDER

AND NOW, TO WIT, this 22nd day of January, 1982, for the reasons expressed in the foregoing Memorandum, IT IS ORDERED as follows:

1. Defendants' motion to stay and to modify the consent decree is *denied;*

2. The motion of plaintiff Delaware Valley Citizens' Council for Clean Air to declare the defendants in civil contempt and to establish sanctions is *granted in part* and *denied in part* as follows:

a. The Commonwealth of Pennsylvania, the Secretary of the Pennsylvania Department of Transportation, and the Secretary of the Pennsylvania Department of En-

vironmental Resources are hereby *declared* to be in *civil contempt;*

b. The Secretary of the United States Department of Transportation ("Secretary"), or his designee, *shall not approve* any projects *or award* any grants under Title 23 of the United States Code in the Philadelphia or Pittsburgh Areas, as those areas are defined in ¶2(c)(vi) below, other than for safety, mass transit, or transportation improvement projects related to air quality improvement or maintenance, *see* 42 U.S.C. §7506(a);

c. The Secretary, or his designee, *may approve* such projects *or award* such grants under Title 23 of the United States Code for safety, mass transit, or transportation improvement projects related to air quality improvement or maintenance in the Philadelphia or Pittsburgh Areas, as those areas are defined in ¶2(c)(vi) below, in any manner permitted by law; *provided* that the following additional requirements are fulfilled before any such approval or award becomes final:

(i) The Secretary, or his designee, *shall certify,* in writing, that the project approved or grant awarded is for safety, mass transit, or transportation improvement projects related to air quality improvement or maintenance in the Philadelphia or Pittsburgh Areas, as those areas are defined in ¶2(c)(vi) below;

(ii) The certficate required by ¶2(c)(i) above *shall specify* which of the excepted purposes are expected to be served by approval of the grant or award of the project;

(iii) The certificate required by ¶2(c)(i) above *shall contain* a brief statement of the factual grounds for

the approval of the project or award of the grant and how said approval of the project or award of the grant is expected to serve the purpose or purposes set forth in the certification under ¶2 (c) (ii) above;

(iv) The original copy of the certificate required under ¶2 (c) (i) above shall be *filed* with the Court and copies *served* upon all counsel;

(v) The Secretary's approval of any project or award of any grant under the exception provided in ¶2 (b) above shall become final *thirty (30) days* after the certificate required by ¶2 (c) (i) above is filed and served, *unless*, within that time, the Court issues an Order staying the approval or award;

(vi) The *Philadelphia Area* shall consist of Philadelphia, Bucks, Montgomery, Chester and Delaware Counties; the *Pittsburgh Area* shall consist of Allegheny, Beaver, Butler, Westmoreland and Washington Counties; *see* Consent Decree ¶¶3 (F), 3 (G);

d. In all other respects, the motion of plaintiff Delaware Valley Citizens' Council for Clean Air to declare the defendants in civil contempt and to establish sanctions is *denied*.

(s) Louis C. Bechtle
LOUIS C. BECHTLE, J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Actions
No. 76-2068

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, *et al.*

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COMMONWEALTH OF PENNSYLVANIA, *et al.*
and No. 77-619

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*

MEMORANDUM AND ORDER

BECHTLE, J., February 18, 1982

Presently before the Court is the motion of the defendant Commonwealth of Pennsylvania for a stay pending appeal of the Court's Order of January 22, 1982, in which the Court enjoined the United States Secretary of Transportation from approving projects or awarding grants under Title 23 of the United States Code in the Philadelphia and Pittsburgh areas except as further provided in that Order. For the reasons set forth below, the motion will be denied.

Most of the arguments raised by defendant to demonstrate the likelihood of success on appeal have been previously advanced by the Commonwealth or its agencies in legal memoranda submitted in this case. Those issues will not be discussed further here. The Court stands on the analysis of those issues set forth in its memorandum of January 11, 1982. Nevertheless, several of the arguments raised here for the first time in the Commonwealth's motion, merit brief discussion.

First, the Commonwealth argues that the United States Secretary of Transportation cannot be enjoined because he is not a party to the action. The United States *is* a party to the action as one of the plaintiffs in this case. The Secretary of Transportation is an agent of that party. The Court sees no jurisdictional difficulty in effectuating its judgments by means of an injunction running against an agent of a named party to the action.

Secondly, the Commonwealth has misunderstood the use made by the Court of section 176 of the Clean Air Act, 42 U.S.C. §7506, in fashioning the injunction. By no means did the Court purport to enforce directly the provisions of the Clean Air Act. Rather, as the Court stated in its memorandum, the Court was merely exercising its equitable discretion to fashion an appropriate coercive sanction for the defendants' contempt. *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*, Nos. 76-2068 and 77-619, slip op. at 22 (E.D. Pa. January 22, 1982). The injunction against approving projects or awarding grants under Title 23 of the United States Code was selected because the Court believed—as it continues to believe—that such a remedy would constitute an appropriate remedy for the reasons set forth in the Court's memorandum. The Court carefully stated that the remedy

selected was "suggested"—not "mandated" or "required" —by the Clean Air Act itself. *Id.* The fact that the Administrator of the Environmental Protection Agency ("EPA") would be required to apply some other remedy if the Commonwealth were now before that agency does not alter or serve to restrict or even define the limits of the outcome here. The Clean Air Act does not limit the remedies available to a federal court in enforcement proceedings arising under that statute. Thus, the Court is not confined to the use of the remedies available to the EPA in similar circumstances, but may choose a form of relief that lies within the realm of sound discretion. This the Court believes it has done.

Since the Commonwealth has failed to show, for the reasons set forth above, a reasonable likelihood of success on appeal, *see Halderman v. Pennhurst State School and Hospital*, 451 F. Supp. 233, 235 (E.D. Pa. 1978), the motion for a stay of the Court's Order of January 22, 1978 will be denied.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Actions
No. 76-2068

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, *et al.*

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*
and No. 77-619

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*

ORDER

AND NOW, TO WIT, this 18th day of February, 1982, for the reasons stated in the foregoing Memorandum, IT IS ORDERED that the motion of the Commonwealth of Pennsylvania for a stay pending appeal from the Court's Order of January 22, 1982, is *denied*.

(s) Louis C. Bechtle
Louis C. Bechtle, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Friday, March 19, 1982

Delaware Valley Citizens' Council for Clean Air, et al. v. Commonwealth of Pa., et al.

United States of America v. Commonwealth of Pa., et al.
No. 82-1104

Present: ADAMS, HUNTER, and GARTH, *Circuit Judges*.

1. The motion to expedite submission of this case to the merits panel is granted and the case will be listed for argument on Thursday, May 13th.

2. The motion by the United States of America to remand the record to the district court for the limited purpose of permitting the district court to rule upon a motion to be filed by the United States which would permit a partial modification of the district court's January 22, 1982 order is hereby granted with a request to the district court that this motion be given prompt treatment in view of the scheduled oral argument in this Court on May 13th.

3. The motions by the Associated Pennsylvania Constructors, The Greater Pittsburgh Chamber of Commerce, the County of Allegheny, the City of Pittsburgh, the Pennsylvania Asphalt Pavement Association, and The Greater Philadelphia Chamber of Commerce to participate as amicus curiae are hereby granted.

4. The motion to stay the district court's order dated January 22, 1982, pending the submission of this case to the merits panel on May 13th, is hereby granted. Judge

Garth would deny the stay except that he would permit the stay to enable the United States Government to provide funds for the Commonwealth of Pennsylvania in the event of emergencies. His reasons are stated separately at the foot of the order.

5. All the members of the panel express their grave concern regarding the failure of the General Assembly of Pennsylvania to enact legislation to implement the Consent Decree. Whatever question there may be regarding the precise contours of the district court's power to provide an equitable remedy in a situation such as is present in this case, there would appear to be no question regarding the obligation of the various state agencies to take steps to implement a Consent Decree entered into a number of years ago and which in turn was utilized to obtain substantial funds from the Federal Government.

6. Judge Garth believes that the sanction imposed by the district court is clearly related to compelling the Commonwealth's compliance with the Consent Decree by which it is bound, and into which it entered, on August 29, 1978. He is also of the view that the responsibility for any failure of the Commonwealth to receive federal highway funds and the consequences thereof, belongs to the Pennsylvania legislature and not to the district court. The ability to cure the contempt imposed by Judge Bechtle is peculiarly within the power of the legislature. Judge Garth's evaluation of the Commonwealth's position taken on this motion is that the reliance of the Commonwealth on the authorities cited by it is misplaced, and that the district court has not improperly nor unconstitutionally intruded into the Commonwealth's province. Accordingly, he believes that the Commonwealth has little or no like-

lihood of success when this issue is heard on the merits. *See O'Brien v. Brown*, 409 U.S. 1, 3 (1972) (per curiam). Because the legislature can promptly cure the contempt and can thereby make immediately available to the Commonwealth the federal funds directed to be withheld by the district court's order, it is Judge Garth's judgment that the stay should be denied, except that he would permit a stay solely to enable the United States Government to provide funds for the Commonwealth in the event of emergencies.

By the Court,
(s) Arlin M. Adams
Circuit Judge

Dated: March 19, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1104

DELAWARE VALLEY CITIZENS' COUNCIL
FOR CLEAN AIR, et al.

v.

COMMONWEALTH OF PA., et al.
(C.A. No. 76-2068)

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PA., et al.
(D.C. No. 77-0619)

Commonwealth of Pennsylvania, et al.,
Appellants

SUR PETITION FOR REHEARING

Present: ADAMS, GIBBONS, HUNTER, WEIS, GARTH, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by Delaware Valley Citizens' Council for Clean Air in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and

no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,
ARLIN M. ADAMS
Circuit Judge

Dated: April 6, 1982

STATEMENT OF JUDGE ADAMS SUR DENIAL OF PETITION FOR RECONSIDERATION

On March 19, 1982, over Judge Garth's dissent, a panel of this Court granted the Commonwealth of Pennsylvania's motion for a stay until this matter might be considered by the merits panel, and listed the case for expedited disposition on the merits on May 13, 1982. Appellees now have petitioned this Court to reconsider its decision to grant a stay.

In our order of March 19, we expressed "grave concern regarding the failure of the General Assembly of Pennsylvania to enact legislation to implement the Consent Decree . . . entered into a number of years ago and which in turn was utilized to obtain substantal funds from the Federal Government." That failure on the part of the General Assembly may well mean that the Commonwealth will not succeed before the merits panel. Nonetheless, in view of the overriding public interest in maintaining the flow of sorely needed federal highway funds to the Commonwealth, and in view of the fact that we had been advised that a significant number of highway construction jobs would be lost as a result of the failure to grant a stay, we believed it appropriate to permit these important projects—affecting thousands of citizens —to proceed for a very short period pending consideration of the matter by the merits panel, which, of course, would have the advantage of full briefing. Only in this way could we avoid subjecting "innocent" third parties—citizens of Pennsylvania—to unnecessary and perhaps irreparable hardship. *See Constructors Association of Western Pennsylvania v. Kreps*, 573 F.2d 811, 815 (3d Cir. 1978).

Moreover, we did not believe that the grant of a stay under these circumstances would derogate the authority of the district judge any more than stays ordinarily do.

In his statement, Judge Garth concludes that the Commonwealth cannot "sustain its position on irreparable injury because . . . the legislature has within its power the ability to discharge the imposed sanction." Typescript op. at 2. While that is concededly true, it is not, in my view, relevant to the issue of irreparable harm. In fact, the question whether the legislature can persist in pursuing its chosen course—without subjecting Pennsylvania to the sanction imposed by the district judge—is one of the very issues to be resolved by the merits panel several weeks from today.

Accordingly, I vote to deny the petition for rehearing en banc.

Judge Hunter joins in this statement.

GARTH, *Circuit Judge*, dissenting from denial of rehearing en banc.

On January 22, 1982, the U.S. District Court for the Eastern District of Pennsylvania held the Commonwealth of Pennsylvania and the Secretaries of the Pennsylvania Departments of Transportation and Environmental Resources in civil contempt for failing to implement the automobile emissions inspection/maintenance (I/M) program mandated by the August 29, 1978 Consent Decree signed by the Commonwealth and the plaintiffs, Delaware Valley Citizens' Council for Clean Air and the United States. *See Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pa.*, No. 81-2303 (3d Cir. Mar. 1, 1982). Implementation of the I/M program ceased after the Pennsylvania legislature, over the Governor's veto, passed House Bill No. 456 on October 5, 1981. That bill prohibits any department or agency of the executive branch of the state government from spending any public funds for the establishment and administration of an I/M program.

As the sanction for the contempt, the district court decreed that the Secretary of the U.S. Department of Transportation shall not approve any projects, or award any grants, under the federal highway aid programs in the Philadelphia or Pittsburgh areas that are covered by the Consent Decree, other than for safety, mass transit, or transportation improvement projects related to air quality improvement or maintenance. The district court, on February 18, 1982, refused to stay its order pending appeal. The Commonwealth, supported by various *amici*, then sought such a stay from a panel of this court. On March

19, 1982, the panel granted the stay. I dissented from that ruling.

I dissented from the order which granted the stay because I believed then, as I do now, that the sanction imposed by the district court is clearly related to compelling the Commonwealth's compliance with the Consent Decree; that the responsibility for any failure of the Commonwealth to receive federal highway funds and the consequences thereof, belongs to the Pennsylvania legislature, which has the immediate ability to cure the contempt; and that the district court has not improperly nor unconstitutionally intruded into the Commonwealth's province.

With recognition of the fact that it was a *consent* decree into which the Commonwealth entered on August 29, 1978, and recognizing the Commonwealth's history of reluctance to comply with that decree despite numerous extensions of time and opportunities granted to do so, I conclude that the district court judge did not abuse his discretion in denying the stay. In my opinion, the Commonwealth cannot show a likelihood of success when the merits of its appeal are addressed. *See O'Brien v. Brown*, 409 U.S. 1, 3 (1972) (per curiam). Nor can the Commonwealth, in my view, sustain its position on irreparable injury because, as I have noted, the legislature has within its power the ability to discharge the imposed sanction. It can do so by permitting state funds to be expended to implement the decree by which the Commonwealth, and thus the legislature, is already bound. By such an act, all federal highway funds could immediately be freed. Finally, there is no countervailing interest which would sustain the legislature's action when balanced against the public interest in having both the federal highway funds

available and the benefits from implementation of the Consent Decree's environmental protections. Thus, on all counts, when tested by the established standard for the granting of a stay, the Commonwealth has failed to carry its burden. *See Beverly v. United States*, 468 F.2d 732, 740-41 n. 13 (5th Cir. 1972).

In addition, there is the distinct possibility, noted in Delaware Valley's petition for rehearing, that while the stay remains in effect pending appeal, the Commonwealth may receive all or part of the $300 million in highway funds that are the subject of the district court's order. Such a development would deprive the district court and this court of an effective sanction if the district court's order is ultimately upheld—as I have predicted it will be —by the merits panel. That this is not a fictitious, but rather a real possibility is suggested by the argument made by the United States when we considered the Commonwealth's stay motion. At that time, the United States sought a remand to the district court so that its sanction could be modified to permit the federal government to provide the Commonwealth with funds for *all* interstate highway projects. The United States expressed no desire to withhold these funds in order to compel the Commonwealth's compliance with the environmental standards embodied in the Consent Decree.

I do not believe that the Commonwealth should be permitted to flout orders of the United States District Court with impunity. The Governor of Pennsylvania, in vetoing House Bill 456, which prohibited the Commonwealth from funding the implementation of the Consent Decree, had foreseen this very sanction and had warned the legislature that federal highway funds might well be

cut off if the bill were passed. The Pennsylvania legislature, in the face of this warning, nevertheless chose to override his veto and chance the dire consequences to the Commonwealth and its citizens that it now blames on the district court. While I firmly believe that federal courts should not interfere with matters that are purely state prerogatives, *see Halderman v. Pennhurst State School & Hosp.*, Nos. 78-1490, -1564, -1602, slip op. at 36-55 (3d Cir. Feb. 26, 1982) (en banc) (Garth, J., concurring in part and dissenting as to relief); *Rennie v. Klein*, 653 F.2d 836 (3d Cir. 1981) (en banc), this case involves substantially different interests and considerations.

By permitting this stay of the district court's sanction, the action of the legislature in ignoring its obligations under law will be rewarded, its violations of the Consent Decree will be condoned, and the legislature will be emboldened to persist in its contumacious conduct. The efforts of the district court to enforce compliance with its decree will thereby be thwarted. I would therefore grant Delaware Valley's petition for rehearing and would deny any stay of the district court's order except that I would permit a stay solely to enable the United States Government to provide funds for the Commonwealth in the event of emergencies.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1104

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, ET AL., AMERICAN LUNG ASSOCIATION OF PHILADELPHIA, AND MONTGOMERY COUNTY, DELCHESTER LUNG ASSOCIATION, SIERRA CLUB, PENNSYLVANIA CHAPTER, FRIENDS OF THE EARTH OF THE DELAWARE VALLEY, CITIZENS' COMMITTEE FOR ENVIRONMENTAL CONTROL, QUINN, KEVIN, FARRELL, KAYSI, WEISS, RUTH G., KLINKNER, JOHN, BIEZ, ELIZABETH S., SHULMAN, MONA

v.

COMMONWEALTH OF PA., & TRAIN, RUSSELL E., Ind. & as ADMINISTRATOR of the ENVIRONMENTAL PROTECTION AGENCY, ET AL., SHERLOCK, WILLIAM T., Individually and as Secretary of the PA Dept. of Transportation, GODDARD, MAURICE K., Individually and as Secretary of the PA Dept. of Environmental Resources, SNYDER, DANIEL, J., III, Individually and as Regional Administrator of the Environmental Protection Agency, Region III

(D.C. Civil No. 76-2068)

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA; THE PENNSYLVANIA DEPARTMENT OF TRANSPORTATION and WILLIAM T. SHERLOCK, SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF TRANSPORTATION; THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MAURICE K. GODDARD, SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES

(D.C. Civil No. 77-0619)

Commonwealth of Pennsylvania, Secretary of Pennsylvania Department of Transportation and Secretary of Pennsylvania Department of Environmental Resources,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued May 13, 1982

Before: GIBBONS and HUNTER, *Circuit Judges* and GERRY,* *District Judge*

(Opinion filed May 21, 1982)

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* Hon. John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

GIBBONS, *Circuit Judge:*

On August 29, 1978, a consent final judgment bound the Commonwealth of Pennsylvania to implement an inspection and maintenance program for automobile emission systems in the counties in the Pittsburgh and Philadelphia areas. Three years later, after the Commonwealth was found to be in violation of the decree, the state legislature enacted a bill prohibiting further funding for this program. The district court on January 22, 1982, held the Commonwealth to be in civil contempt, and as a sanction to coerce compliance ordered the Secretary of the United States Department of Transportation to refrain from approving and awarding certain grants of federal highway funds to the Commonwealth. The Commonwealth appeals from the January 22, 1982 order. We affirm.

I.

This litigation has its origins in the requirements of the Clean Air Act of 1970, as amended, 42 U.S.C. §7401 et seq. Pursuant to the Act, in April of 1973 the Pennsylvania Department of Environmental Resources (Penn DER) submitted a plan for meeting federal air quality standards for carbon monoxide and ozone levels in the metropolitan Philadelphia and southwestern Pennsylvania regions. As modified and promulgated by the United States Environmental Protection Agency (EPA) in November of that year, the plan included a provision requiring the implementation of a program for the inspection and maintenance of automobile emissions systems (I/M program) by May 1, 1975, 40 C.F.R. §52.2038 (1981). The Commonwealth petitioned this court for review of certain

aspects of the plan, but did not seek review of the I/M program requirement. *See Commonwealth of Pennsylvania v. EPA*, 500 F.2d 246 (3d Cir. 1974).

When, by mid-1976, an I/M program had not been implemented, the Delaware Valley Citizens' Council for Clean Air (Delaware Valley) brought suit under 42 U.S.C. §7604 against both the Commonwealth defendants and the EPA (the latter for failing to enforce the Commonwealth's obligation). The EPA also instituted an action of its own against the Commonwealth, pursuant to 42 U.S.C. §7413(b). It was then dismissed as a defendant in the Delaware Valley suit, and both actions against Pennsylvania were consolidated.

On August 29, 1978, following prolonged discovery and negotiations, the Commonwealth and two of its departments, Penn DER and the Pennsylvania Department of Transportation (Penn DOT), agreed to a final consent judgment terminating both the Delaware Valley and the United States actions. The defendants agreed to implement an I/M program for ten counties in the Philadelphia and Pittsburgh areas by August 1, 1980.[1] The consent judgment provided that Penn DOT would first seek legislation instituting a franchise I/M system under which the Commonwealth would enter into contracts with garage owners for establishment of inspection stations. The judgment provided that should the legislature fail to effect such a system, Penn DOT would promulgate regulations providing for a private garage I/M system under which the Com-

[1] Under the consent decree the Philadelphia area is comprised of Philadelphia, Bucks, Montgomery, Chester and Delaware Counties, while Allegheny, Beaver, Butler, Westmoreland and Washington Counties fall in the Pittsburgh area.

monwealth would certify a number of privately owned facilities to perform the inspections. When the legislature did not enact a franchise system, Penn DOT issued final regulations authorizing the alternative system. 9 Pa. Bull. 4193 (Dec. 22, 1979).

On March 7, 1980, the district court approved a modification of the consent decree, agreed to by the parties, delaying implementation of the I/M program until May 1, 1981. The following year, the Commonwealth sought another delay. After failing to reach agreement with the plaintiffs for a second postponement, purportedly to permit the Commonwealth to require participating private garages to use a more sophisticated but still commercially unavailable type of testing equipment, the Commonwealth filed a motion in the district court on April 29, 1981, for a modification of the decree that would delay implementation until January 1, 1983. The next day, the date implementation was due under the once modified decree, Delaware Valley requested the district court to declare the Commonwealth in violation of the consent decree.

After requesting and receiving certain information from EPA indicating the continuing unsatisfactory state of current air quality in the Philadelphia and Pittsburgh areas, the district court, on May 20, 1981, denied the Commonwealth's request for a modification of the decree, found the Commonwealth in violation, and ordered submission of a plan for immediate implementation of the I/M program. The Commonwealth submitted such a plan, and the court approved it with certain amendments suggested by Delaware Valley. On June 16, 1981, the judgment was modified in several respects including another extension of the deadline for implementation of the I/M

program until May 1, 1982. On July 24, 1981, the district court denied a Commonwealth motion for reconsideration of the June 16 order. These district court orders were affirmed by this court on March 1, 1982.[2]

In the meantime, the state legislature had decided to take the matter into its own hands. Following the district court's decision in June of 1981, the Pennsylvania General Assembly passed House Bill No. 456, §2 (H.B. 456), which prohibited the expenditure of state funds by the executive branch for the implementation of the I/M program. Although the Governor vetoed the bill, the legislature overrode the veto and enacted H.B. 456 into law. Act of October 5, 1981, No. 99, §2, 1981 Pa. Legis. Serv. 312 (to be codified at Pa. Stat. Ann. tit. 71, §523) Penn DOT and the executive branch immediately ceased all efforts toward implementing the I/M program, except for publication of final regulations pertaining to the standards for emission analyzers to be purchased by the private garage owners choosing to participate in the program. 11 Pa. Bull. 3519 (Oct. 10, 1981).

Following the enactment of H.R. 456, two motions were filed in the district court. The Commonwealth and Penn DOT requested a stay and a modification of the consent decree in view of their present alleged inability to comply with the decree's requirements despite the stated willingness of the executive branch to do so. Delaware Valley requested that the defendants be declared in civil contempt and that sanctions be imposed. The United States filed a brief taking the position that defendants' motion should be denied, but that the district court should postpone a ruling on the civil contempt motion and defer

[2] No. 81-2303 (3d Cir. March 1, 1982).

to the EPA for the initiation of administrative proceedings and remedies under the Clean Air Act.[3]

On January 22, 1982, the district court denied the defendants' motion for a stay, declared the Commonwealth and the Secretaries of Penn DOT and Penn DER to be in civil contempt, and as a sanction, ordered the Secretary of the United States Department of Transportation to refrain from approving any projects or awarding any grants under Title 23 of the United States Code for highways in areas in the Commonwealth covered by the consent decree, other than for purposes of safety, mass transit, or transportation projects related to air quality improvement or maintenance.[4] Defendants appealed and moved for a stay of the district court civil contempt order pending appeal. A stay was granted by this court on March 19, 1982,[5] and a petition by Delaware Valley for rehearing en banc of that stay was denied on April 6, 1982.[6] One other legal maneuver worthy of note is the motion by two groups of Pennsylvania legislators to intervene as defendants. The

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[3] The EPA did in fact issue to the Commonwealth a notice of deficiency because of a lack of funding assurances required by sections 172(b)(7) and 110(a)(2)(F) of the Clean Air Act, 42 U.S.C. §§7502(b)(7), 7410(a)(2)(F). 46 Fed. Reg. 58593 (Dec. 2, 1981). It requested the Commonwealth to revise its implementation plan within 90 days or face a ban on construction and modification of major stationary sources of ozone and carbon monoxide. On March 5, 1982, the EPA also proposed to withhold Clean Air Act funds from Penn DOT and Penn DER totalling a little over $700,000. The EPA is presently deferring issuing these funds pending the outcome of a public hearing and final action by the EPA Administrator. U.S. Brief at 23.

[4] Nos. 76-2088, 77-619 (E.D. Pa. Jan. 22, 1982).

[5] No. 82-1104 (3d Cir. March 19, 1982).

[6] No. 82-1104 (3d Cir. April 6, 1982).

district court denied their motion as untimely,[7] and this court affirmed that denial, holding, *inter alia*, that any of their interests were adequately represented by the Commonwealth defendants.[8]

II.

The Commonwealth appellants contend that by virtue of the Pennsylvania Constitution they cannot be held in civil contempt. Article 3, Section 24 of that Constitution provides that "[n]o money shall be paid out of the treasury, except on appropriations made by law and on warrant issued by the proper officers; . . ." Pennsylvania courts have interpreted this clause to mean officials in the executive branch of state government may not expend funds (and thus may not be ordered to do so by a state court) specifically appropriated by the state legislature for one purpose to carry out another program. *Shapp v. Sloan*, 480 Pa. 449, 391 A.2d 595 (1978), *appeal dismissed sub nom. Thornburgh v. Casey*, 440 U.S. 942 (1979); *Ashbourne School v. Commonwealth Department of Education*, 43 Pa. Commw. Ct. 593, 402 A.2d 161 (1979).

Section 2 of H.R. 456 provides:

> *Prohibition on Expenditures for Emission Inspection Program*
>
> Neither the department [of Transportation] nor any other department or agency of the Executive Branch of State Government shall expend any public funds for the establishment and administration of any system for the periodic inspection of emissions or emission system of motor vehicles.

[7] No. 76-2068 (E.D. Pa. March 25, 1981).

[8] No. 81-2011 (3d Cir. March 1, 1982).

Act of October 5, 1981, No. 99, §2, 1981 Pa. Legis. Serv. 312 (to be codified at Pa. Stat. Ann. tit. 71, §523). Thus, appellants argue, members of the executive branch such as Penn DOT and Penn DER officials are powerless under state law to comply with the consent decree. Given this inability of the executive branch to comply, it is urged that the district court should not have held executive branch officials in contempt. And since, appellants urge, the state legislature is not a party to this action, it would be mistaken to hold the Commonwealth responsible for actions of the legislature.

These arguments disregard the fact that the Commonwealth itself was and remains bound by the consent decree. First Delaware Valley and then the United States brought suit both against the Commonwealth and against state executive branch officials. Nos. 76-2068, 77-619 (E.D. Pa.). By its terms, "[t]he provisions of this Consent Decree apply to the Defendants Commonwealth of Pennsylvania, . . . and to each of the officers, agents, employees and successors of said parties." This court has previously noted that the Pennsylvania Department of Justice, members of which were signatories of this decree, has the exclusive power to compromise and settle lawsuits against the Commonwealth. *Vecchione v. Wohlgemuth*, 558 F.2d 150, 156 (3d Cir.), *cert. denied*, 434 U.S. 943 (1977). And in this case, we have also recently noted that the Attorney General, who heads the Department of Justice, has represented the Commonwealth in this litigation from the time the complaint was filed, through the negotiation and signing of the consent decree, and up to the present. No. 81-2011 (3d Cir. March 1, 1982) (denying state legislators' motion for intervention since Com-

monwealth's interests already adequately represented by Commonwealth defendants).[9]

Neither can there be any objection to holding the Commonwealth to the terms of the decree based upon the eleventh amendment of the United States Constitution.[10] That amendment does not apply in suits brought by the United States against a state.[11] Moreover entry of a consent judgment is a waiver of any eleventh amendment immunity that the Commonwealth might have earlier wished to claim.[12]

Because the Commonwealth, including all its branches, is bound by the consent judgment, the argument

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[9] Further evidence that the Commonwealth defendants were authorized to enter into the consent decree, mentioned by the district court, is past and present legislation that authorizes Penn DOT to establish an I/M program. Very recently the Commonwealth Court of Pennsylvania interpreted this legislation as providing Penn DOT with continuing authority, if not the financial means, to establish, implement, and maintain an I/M program. Burd v. Commw. of Pennsylvania, Nos. 1506, 1762 (Pa. Commw. Ct. April 24, 1982). We do not suggest that such legislation is necessary before the Commonwealth defendants could enter into the consent decree. But it certainly provides evidence that there was no fundamental division between the executive and legislative branches at the time the decree was signed.

[10] The eleventh amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

[11] *E.g.*, United States v. Mississippi, 380 U.S. 128, 140-41 (1965); United States v. Commw. of Pennsylvania, Dept. of Highways, 349 F. Supp. 1370, 1385-86 (E.D. Pa. 1972).

[12] *See* Vecchione v. Wohlgemuth, *supra*, 558 F.2d at 159.

of inability to comply rings hollow. Even if the executive branch defendants were physically[13] or legally[14] incapable of complying with the decree, those Commonwealth officials sitting in the General Assembly certainly are not incapable of insuring the Commonwealth's compliance. The sanction ordered by the district court does not single out the executive branch defendants in bringing pressure to obtain compliance. Thus those defendants cannot complain of any unfair burden upon them. Since the Commonwealth is able to comply with the consent decree, a declaration that it is in civil contempt cannot be reversed on grounds of impossibility of compliance.

III.

The Commonwealth also urges that a concern for unjustified interference in state functions by the federal government should prevent a declaration of civil contempt in the circumstances of this case. The district court expressed hesitation about its own power "under our federalist system to countermand the decision of a state legislature not to expend state funds on the establishment of an I/M program" and even about Congressional power

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[13] There has been no showing that there are presently no funds physically reachable by Penn DOT and Penn DER for purposes of implementing an I/M program. Thus cases reversing a finding of civil contempt because the contemnor was physically unable to comply with a court order are not controlling. *See* Shillitani v. United States, 384 U.S. 364 (1966); Maggio v. Zeitz, 333 U.S. 56 (1948).

[14] There is no necessity in this appeal to decide whether H.R. 456 is unconstitutional as a violation of either the supremacy clause, U.S. Const. art IV, cl. 2, or the impairment of contracts clause, U.S. Const. art I, §10, cl. 1.

to require states to implement such a program.[15] The Commonwealth asserts that despite the district court's expressed concerns for our federal system, it has nevertheless applied pressure, albeit indirect, on the state legislature to expend funds. The Commonwealth relies on *New York State Association for Retarded Children, Inc. v. Carey*, 631 F.2d 162 (2d Cir. 1980), as authority for the proposition that a federal court may never coerce a state legislature. Although the opinion of the court in *Carey* expresses concern about federal courts attempting to direct state officials to raise and appropriate large sums of money, 631 F.2d at 165, the consent judgment in that case in fact only required the Governor to seek financing "subject to any legislative approval that may be required." 631 F.2d at 163. As the concurring opinion in that case points out, the fact that the consent judgment was not violated was all that was necessary to reverse a declaration of contempt. 631 F.2d at 166-67 (Kearse, J., concurring). The consent judgment in this case is not explicitly subject to the condition found in the *Carey* judgment. There is no evidence that any of the parties who signed the decree intended such a condition, even implicitly. That, for example, the decree directs Penn DOT to use its best efforts to obtain legislation for a franchise system and, failing that, to implement a private garage system, in no way indicates that the Commonwealth is not bound to implement some I/M program.

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[15] For this latter doubt, the court cites National League of Cities v. Usery, 426 U.S. 833 (1976). *But see* United Transportation Union v. LIRR, 50 U.S.L.W. 4315 (U.S. March 23, 1982); Kramer v. New Castle Area Transit Authority, No. 81-2223 (3d Cir. April 30, 1982).

For many of the same reasons that a finding of civil contempt was justified, the district court was also justified in refusing to grant defendants' third motion for modification of the judgment. The stringent requirements necessary for obtaining Fed. R. Civ. P. 60(b) relief from a judgment are not in the least satisfied here. *See Mayberry v. Maroney*, 529 F.2d 332, 335-56 (3d Cir. 1976). As the district court noted, the only changed circumstance cited by the Commonwealth is the enactment of H.B. 456, a matter within its control. A party bound by a judgment cannot rely, as a ground for relief under Rule 60(b), upon its own change of position.

IV.

The Commonwealth advances several arguments predicated upon the Clean Air Act itself. Section 176 of the Act provides, in part:

> Limitations on certain Federal assistance
>
> Approval of projects or award of grants
>
> (a) The Administrator shall not approve any projects or award any grants authorized by this chapter and the Secretary of Transportation shall not approve any projects or award any grants under Title 23 other than for safety, mass transit, or transportation improvement projects related to air quality improvement or maintenance, in any air quality control region—
>
> (1) in which any national primary ambient air quality standard has not been attained,
>
> (2) where transportation control measures are necessary for the attainment of such standard, and

(3) where the Administrator finds after July 1, 1979, that the Governor has not submitted an implementation plan which considers each of the elements required by section 7502 of this title or that reasonable efforts toward submitting such an implementation plan are not being made (or, after July 1, 1982, in the case of an implementation plan revision required under section 7502 of this title to be submitted before July 1, 1982).

Implementation of approved or promulgated plans

(b) In any area in which the State or, as the case may be, the general purpose local government or governments or any regional agency designated by such general purpose local governments for such purpose, is not implementing any requirement of an approved or promulgated plan under section 7410 of this title, including any requirement for a revised implementation plan under this part, the Administrator shall not make any grants under this chapter.

42 U.S.C. §7506 (Supp. II 1978).

The Commonwealth urges, first, that this section provides the exclusive remedy for state and local government violations of the act. It also urges that since the Commonwealth has already submitted an implementation plan, Section 7506(a) (3) makes a cut-off of Title 23 grants authorized in that subsection inapplicable. Cessation of "grants under this chapter" authorized in subsection 7106 (b) (that is, of Clean Air Act grants only) is, according to the Commonwealth, the only available remedy. Finally, the Commonwealth argues that this section of the Act con-

fers primary jurisdiction upon the EPA Administrator and the Secretary of Transportation to impose the specified sanctions only after those agencies have made the requisite findings.

Overlooked in all these arguments is the fact that there is an unappealed final consent judgment entered in 1978. Had the case against the defendants taken a fully litigated course, some of these arguments might have been raised and decided before a judgment became final and no longer reviewable. In 1978, however, the Commonwealth agreed to have a judgment entered requiring that it implement an I/M program. The sanctions imposed by the district court in 1982, the sanctions now before us for review, are sanctions for appellants' civil contempt in violating the consent decree. The district court made quite clear that it was not imposing sanctions on the authority of the Clean Air Act. Arguments regarding that Act's requirements are thus entirely beside the point.

V.

While holding the Commonwealth defendants to be in contempt, the district court declined to declare H.B. 456 unconstitutional and declined to countermand in any direct manner the state legislature's decision not to expend funds on the establishment of an I/M program. Seeking some other sanction designed either to coerce the contumacious party into compliance or to compensate the aggrieved party for loss,[16] the court concluded that Section 176(a) of the Clean Air Act suggested an appropriate sanction, in that Pennsylvania's adoption of H.B. 456, in a

[16] *See* Latrobe Steel Co. v. United Steelworkers of America, AFL-CIO, 545 F.2d 1336, 1344 (3d Cir. 1976).

practical sense, left matters as if the Commonwealth had never submitted the required implementation plan revisions. The court therefore ordered the Secretary of Transportation[17] to refrain from approving any projects or awarding any grants of federal highway funds under Title 23 for the ten counties subject to the consent decree except for safety, mass transit, or transportation improvement projects related to air quality improvement or maintenance in those counties.[18]

[17] There is no barrier to such an order against the Secretary of Transportation. Although the Secretary is not himself a party, his employer, the United States, is. We have previously held, in any event, that injunctive relief against non-parties may be appropriate if necessary to afford full relief. Pittsburgh-Des Moines Steel Co. v. United Steelworkers of America, AFL-CIO, 633 F.2d 302, 307 (3d Cir. 1980).

[18] To insure compliance, the district court added the following conditions before any approval or award may become final in the context of the listed exceptions:

> (i) The Secretary, or his designee, *shall certify*, in writing, that the project approved or grant awarded is for safety, mass transit, or transportation improvement projects related to air quality improvement or maintenance in the Philadelphia or Pittsburgh Areas, as those areas are defined in ¶2(c)(vi) below;
>
> (ii) The certificate required by ¶2(c)(i) above *shall specify* which of the excepted purposes are expected to be served by approval of the grant or award of the project;
>
> (iii) The certificate required by ¶2(c)(i) above *shall contain* a brief statement of the factual grounds for the approval of the project or award of the grant and how said approval of the project or award of the grant is expected to serve the purpose or purposes set forth in the certification under ¶2(c)(ii) above;
>
> (iv) The original copy of the certificate required under ¶2(c)(i) above shall be *filed* with the Court and copies *served* upon all counsel;

Civil contempt proceedings against state officers may justifiably result in the fining or even the conditional jailing of those officials.[19] Whether such action might have been warranted against either state legislative or executive branch officers in the circumstances of this case is an issue not presently before this court, since the district court chose a less direct form of coercion. The standard for our review of a district court sanction for civil contempt is whether the district court abused its wide discretion in fashioning a remedy. *E.g., United States v. Powers*, 629 F.2d 619, 624 (9th Cir. 1980); *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979).

The Commonwealth, relying on *Gautreaux v. Romney*, 457 F.2d 124 (7th Cir. 1972), urges that there was such an abuse. In *Gautreaux* the court overruled a district court remedy that ordered the United States Secretary of Housing and Urban Development to withhold Model Cities Program money from the City of Chicago in order to force compliance with a separate housing desegregation program. The court pointed out that the Model Cities Program itself had not been found to be tainted with racial discrimination and that the order would harm intended beneficiaries of the Model Cities Program. *Id.* at 126-27. *Gautreaux* is not relevant, since it involved not the appropriateness of a coercive sanction to compel compliance

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(v) The Secretary's approval of any project or award of any grant under the exception provided in ¶2(b) above shall become final *thirty (30) days* after the certificate required by ¶2(c)(i) above is filed and served, *unless*, within that time, the Court issues an Order staying the approval of award. [emphasis in original]

[19] Hutto v. Finney, 437 U.S. 678, 690-91 (1978); Vecchione v. Wohlgemuth, *supra*, 558 F.2d at 158.

with an incontestably valid final injunction, but the scope of injunctive relief in the first instance. Moreover, Congress has itself suggested the relationship between a failure to implement programs required by the Clean Air Act and a cut-off of Title 23 funds in 42 U.S.C. §7506(a). Such a cut-off serves both to induce implementation of the I/M program and to inhibit highway building, which itself contributes to the problems which the Clean Air Act is designed to remedy. Any harm resulting to the citizens of Pennsylvania from a lack of federal highway funds can easily be brought to an end by actions of their elected representatives in the state legislature.

VI.

The order of the district court declaring Commonwealth defendants to be in contempt of the consent final judgment, and enjoining the United States Secretary of Transportation from approving certain projects or awarding certain funds until the Commonwealth is in compliance, will be affirmed in all respects.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

OPINION OF THE ATTORNEY GENERAL OF PENNSYLVANIA

OFFICIAL OPINION No. 75-9

Court Administrator—Representation of State Judicial Officers By the Department of Justice—Separation of Powers.

1. The Judicial Branch is not a department, board or commission of the Commonwealth within the meaning of Section 903 of the Administrative Code, 71 P.S. §293.

2. The Constitutional doctrine of separation of powers requires that the total independence of each of the three branches of government be protected and maintained.

3. Representation of state judicial officers by the Department of Justice violates the constitutional doctrine of separation of powers.

4. The Court Administrator of Pennsylvania has authority under Article V, §10(b) of the Constitution of the Commonwealth of Pennsylvania to hire attorneys to represent the judiciary.

Harrisburg, Pa.
February 24, 1975

Honorable Alexander P. Barbieri
Court Administrator of Pennsylvania
Philadelphia, Pennsylvania

Dear Judge Barbieri:

In the past, the Department of Justice, when requested to do so, has represented members of the judicial branch of the government of the Commonwealth in litigation to which they have been parties. The basis of this policy has been Section 903(b) of the Administrative Code, 71 P.S. §293(b), which requires the Attorney General to "represent the Commonwealth, or any department . . . board, commission, or officer thereof, in any litigation to which the Commonwealth or such department, board, commission, or officer, may be a party, or in which the Commonwealth or such department, board, commission, or officer, is permitted or required by law to intervene or interplead." After reconsidering this policy, it is our opinion, and you are so advised, that the judicial branch is not such a department, board or commission of the Commonwealth as is contemplated by the statute and, further, that members of the judiciary are not such officers as are within the statutory language. It is our opinion that any other interpretation of the statute would violate the Constitutional principle of separation of powers and, that, therefore, our prior practice of representing the judicial branch and members thereof in litigation must be discontinued.

Under our Constitution, the powers of the government are divided between three independent co-ordinate

branches: the legislature, the executive and the judiciary. The Supreme Court of Pennsylvania has made it clear that the principle of separation of powers was established to maintain and protect the independence of the three branches. For example, in a discussion of the constitutional provisions referring to the compensation of judges the Court said:

> "They are independent and co-ordinate, because distinct rights, powers and privileges are assigned to them by the Constitution. Each is entitled to the free, unbiassed, uninfluenced and independent exercise of all their rights, powers and privileges in as ample extent as the Constitution allows." *Commonwealth v. Mann*, 5 W. & S. 403, 407 (1843); Accord. *Commonwealth v. Mathues*, 210 Pa. 372, 59 A.2d 961 (1904).

That Court has also observed that:

> "In a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honours, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction of either the strength or of the wealth of society, and can take no active resolution whatever. It may be truly said to have neither *force* nor *will*, but merely judgment, and to be ultimately dependent upon the aid of the executive arm for the efficacious exercise even of this facul-

> ty. This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is, beyond comparison, the weakest of the three departments of power; that it can never attack with success either of the other two, and that *all possible care is requisite to enable it to defend itself against their attacks.* . . .
>
> . . . liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; . . . the effects of such an union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation, . . . from the natural feebleness of the judiciary it is in continual jeopardy of being overpowered, awed or influenced by its co-ordinate branches. . . . The complete independence of the judiciary is a fundamental principle of the Constitution, designed mainly for the protection of public and private rights. . . ." *Commonwealth v. Mann*, supra at 410-11.

In *Mathues*, relying in substantial part on the *Mann* holding, the Supreme Court of Pennsylvania held that members of the judicial branch were not "public officers" within the meaning of the term as used in a Constitutional provision barring an increase in the salary of such officers during their terms of office, concluding that to hold otherwise would violate a specific provision of the Constitution guaranteeing the judges "adequate compensation" and, more importantly, the general Constitutional principle of separation of powers which, according to the *Mann* decision, that provision was intended to protect. *Commonwealth v. Mathues, supra.*

It is our opinion that this same constitutional theory of separation of powers excludes members of the judicial branch from the coverage of 71 P.S. §293(b), as it is a theory which requires the existence of a certain tension between the separate branches of government which the legal representation of one branch by another tends to eliminate. Such a relationship of dependency by one branch on another creates just that possibility of influence of which the Court spoke in *Mann*.

In saying this, we do not mean to indicate that this relationship has been or will be importantly used. However, as the Supreme Court noted in *Mann*, it is not intentional disrespect to either the judicial or executive branches of government to suppose it possible that cases may arise where successful resort may be had to the potential lever of influence in order to accomplish executive goals. *See, Commonwealth v. Mann*, supra at 409. It is this potential for conflict and influence which, in itself, violates the constitutional doctrine of separation of powers and which must, therefore, be eliminated.

In passing, we should also note that the Department of Justice and agencies whose legal matters it controls employ over 350 attorneys who are involved in litigation in all the courts of the Commonwealth on a continuing basis; thus, the possibility that the Department might be representing a judge in litigation to which he is a party and at the same time be involved in litigation before him is not insubstantial. This potential conflict of interest, while apparently not explicitly barred by the Canons of Ethics, borders on the improper and may, in itself, justify the termination of any representation of judges by the Department of Justice.

Accordingly, you are hereby advised that the Department of Justice will no longer represent in litigation either individual judges or the judiciary itself. In this regard, we believe, and you are so advised, that under Article V, §10(b) of the Constitution of the Commonwealth of Pennsylvania you, as Court Administrator, have the power to hire an attorney or attorneys to represent the judiciary who would be independent of the control of either the executive or legislative branches of government.

Very truly yours,

ALLEN C. WARSHAW
Deputy Attorney General
VINCENT X. YAKOWICZ
Solicitor General
ROBERT P. KANE
Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-2068 and No. 77-619

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, et al.,

Plaintiffs

vs.

COMMONWEALTH OF PENNSYLVANIA et al.,

Defendants

UNITED STATES OF AMERICA,

Plaintiff

vs.

COMMONWEALTH OF PENNSYLVANIA, et al.,

Defendants

CONSENT DECREE

WHEREAS, the United States Environmental Protection Agency (hereinafter "EPA") promulgated a transportation control plan for the Metropolitan Philadelphia and Southwest Pennsylvania Air Quality Control Regions on November 28, 1973 for the purpose of attaining the primary health-related ambient air quality standards for photochemical oxidants and carbon monoxide in the two regions;

WHEREAS, said transportation control plan included the requirement that the Commonwealth of Pennsylvania establish a mandatory inspection/maintenance program for light-duty and medium-duty vehicles in the two regions, 40 CFR Section 52.2038;

WHEREAS, Plaintiff Delaware Valley Citizens' Council for Clean Air, and other Plaintiffs, both organizational and individual, instituted Civil Action No. 76-2068 against the Commonwealth of Pennsylvania, the Secretary of the Pennsylvania Department of Transportation (hereinafter "PennDOT") the Secretary of the Pennsylvania Department of Environmental Resources (hereinafter "PennDER"), the Administrator and Regional Administrator of EPA to enforce the inspection/maintenance regulation, under the authority of the Clean Air Act, as amended, 42 U.S.C. 7401, *et seq.*, on June 29, 1976;

WHEREAS, EPA issued Notices of Violation to the Governor of Pennsylvania and the Secretary of PennDOT on September 23, 1976, under the authority of Section 113(a)(1) of the Clean Air Act, as amended 42 U.S.C. 7413(a)(1), for their failure to implement the inspection/maintenance regulation;

WHEREAS, Plaintiff United States instituted Civil Action No. 77-619 against the Commonwealth of Pennsylvania and certain of its departments and officers on February 18, 1977 under the authority of Section 113(b) of the Clean Air Act, as amended, 42 U.S.C. 7413(b);

WHEREAS, pursuant to a Stipulation entered into by the Plaintiffs in Civil Action No. 76-2068 and EPA on February 16, 1977, EPA was dismissed as a Defendant in that action upon the filing of Civil Action No. 77-619;

WHEREAS, extensive pre-trial motions and discovery proceedings have taken place in these actions, including oral argument of summary judgment motions by all parties on July 21, 1977, several sets of written interrogatories, and oral depositions of 14 employees of the Commonwealth of Pennsylvania;

WHEREAS, the parties agree that the entry of this Consent Decree is the most beneficial means to resolve this litigation;

WHEREAS, this Consent Decree is entered without the adjudication of any issues of fact or law.

NOW THEREFORE, before the taking of any testimony upon the pleadings and upon the consent of the parties by their respective attorneys and authorized officials, it is hereby ORDERED, ADJUDGED, and DECREED:

1. This Court has jurisdiction of the subject matter of these actions and of the parties hereto.

2. The provisions of this Consent Decree apply to the Defendants Commonwealth of Pennsylvania, Secretary of PennDOT and the Secretary of PennDER, to all Plaintiffs and to each of the officers, agents, employees and successors of said parties.

3. The following definitions apply to this Consent Decree:

A. Inspection—the testing of the exhaust emissions of a vehicle by means of the insertion of a probe of an emission analyzer or similar instrument into the tailpipe of the vehicle while its engine is operating.

B. Maintenance—the repair or adjustment of a vehicle in order to reduce the level of its exhaust

emissions below exhaust emission standards prescribed by the Commonwealth.

C. Inspection/maintenance program—a program to reduce subject vehicle exhaust emissions by annually identifying vehicles that require maintenance and requiring that such maintenance be performed.

D. Private garage system—an inspection/maintenance program in which the Commonwealth certifies a number of privately-owned facilities to perform the inspection of vehicles.

E. Franchise system—an inspection/maintenance program in which the Commonwealth enters into a contract with a single person or entity to establish and operate the inspection aspects of the program for a geographic area or areas under the general administration of the Commonwealth and whereby the Commonwealth may also certify fleet operators, and motor vehicle dealers, who own, lease or operate at least 15 subject vehicles, to conduct inspections of subject vehicles owned, leased or operated by them.

F. Philadelphia Area—Philadelphia, Bucks, Montgomery, Chester and Delaware Counties.

G. Pittsburgh Area—Allegheny, Beaver, Butler, Westmoreland and Washington Counties.

H. Light-duty motor vehicle—a gasoline powered 4-wheel motor vehicle rated at 7,000 pounds gross vehicle weight (GVW) or less which is commonly used on public roads or highways.

I. Medium-duty motor vehicle—a gasoline powered motor vehicle rated at more than 7,000 pounds

GVW and no more than 11,000 pounds GVW which is commonly used on public roads or highways.

J. Subject Vehicle—each light-duty or medium-duty motor vehicle registered in the Philadelphia or Pittsburgh area except an antique or classic vehicle as presently defined in the Pennsylvania Vehicle Code, or any other vehicle that the Commonwealth determines is rarely used on the public roads or highways.

K. Inspector—a person authorized by the Commonwealth to perform inspections on subject vehicles.

L. Inspection facility—a place of business authorized by the Commonwealth to perform inspections on subject vehicles.

M. Exhaust emission standard—the level of exhaust emissions, prescribed by the Commonwealth, which separates subject vehicles requiring maintenance from those that do not.

N. Stringency Factor—a measure of the rigor of an inspection/maintenance program based on the estimated percentage of all subject vehicles whose exhaust emissions would exceed the exhaust emission standards for carbon monoxide and/or hydrocarbons prior to the performance of maintenance.

O. Single Sticker System—a system in which one inspection sticker is issued which does not, in any way, distinguish between compliance with the inspection/maintenance program and the inspection program presently in operation in the Commonwealth.

P. Double Sticker System—any system in which the inspection program sticker or stickers is-

sued distinguish between compliance with the inspection/maintenance program and the inspection program presently in operation in the Commonwealth.

4. Because the Commonwealth seeks to secure the enactment by the Pennsylvania General Assembly of enabling legislation for a franchise system, PennDOT shall have until July 1, 1979 to use its best efforts to obtain such legislation. Defendant PennDOT shall further perform those other activities related to the establishment of an inspection/maintenance program which are listed in paragraphs 1 through 3 of the attached Schedule A and paragraph 1 of the attached Schedule B, which are annexed hereto and incorporated by reference into this Consent Decree, by the dates provided therein. If such legislation is not enacted by July 1, 1979, Defendant PennDOT shall immediately proceed toward implementation of a private garage system in accordance with paragraphs 2 through 8 of Schedule B pursuant to, inter alia, 75 P.S. §4701 et seq. However, on or before July 1, 1979, the parties may agree to extend this date to a date no later than October 1, 1979. If such an extension is granted and franchise legislation is not enacted within the extended time period, the dates specified in paragraphs 2 through 6 of Schedule B shall be extended by the same time period as such extension, and the dates specified in paragraphs 7 and 8 of Schedule B will be extended by three months.

5. If enabling legislation for a franchise system is enacted within the time period (or any extension thereof) specified in paragraph 4 above, Defendant PennDOT shall immediately proceed toward implementation of a franchise system in accordance with the schedule set forth in paragraphs 4 through 10 of Schedule A. If such legislation is

enacted, Defendant PennDOT shall not be required to comply with any portion of Schedule B (except as provided in paragraph 4 above).

6. The Executive Branch of the government of the Commonwealth of Pennsylvania shall not reduce below an operating level the funds for the inspection/maintenance program because of any reductions in funds appropriated to PennDOT.

7. Defendants shall establish exhaust emission standards for the inspection/maintenance program which shall result in at least a twenty-five per cent (25%) reduction in both hydrocarbon and carbon monoxide exhaust emissions by December 31, 1987, compared to the level of exhaust emissions that would exist on that date without the program; provided, that in no case will a stringency factor greater than twenty-five per cent (25%) be required if the inspection/maintenance program is implemented in accordance with the time periods specified in this Consent Decree. Should Defendants fail to establish the mandatory inspection/mandatory maintenance phase of the program on the dates specified in the applicable attached compliance schedule, Plaintiffs may seek modification of such stringency factor in order to achieve the above-referenced twenty-five per cent (25%) exhaust emissions reduction. In the event that the carbon monoxide or the photochemical oxidant primary ambient air quality standard is attained in the Philadelphia or the Pittsburgh area, the required reduction in the related exhaust emissions may be reduced in such area to a level which will at a minimum maintain such standard.

8. Defendant Commonwealth of Pennsylvania will pay, within thirty days of the entry of this Decree, reasonable counsel fees and costs to Plaintiffs' counsel in Civil

Action No. 76-2068, the Public Interest Law Center of Philadelphia, in the amount of $30,000.00, which is a full, final and complete settlement of all counsel fees, costs and any other expenses.

9. The United States and the Public Interest Law Center of Philadelphia, counsel for Plaintiffs in Civil Action No. 76-2068, will reach final agreement on the attorneys' fees question within two weeks of the entry of this decree.

10. In order to defray a portion of the start-up costs of the inspection/maintenance program, EPA hereby agrees to award a grant of $400,000.00 to PennDOT. PennDOT agrees that it shall submit no later than ninety days prior to the date upon which expenditures of funds are to be made, a full and complete grant statement (on a form to be supplied by EPA) which shall include, but not be limited to, a work plan, budget, and a statement of federal and non-federal funds to be used for the project. EPA's review of said grant statement shall be limited to insuring its completeness, insuring that moneys listed are to solely be used for inspection/maintenance start-up costs, and insuring that the payment and expenditures of funds will be made in accordance with all applicable Federal laws and regulations. The parties agree that payment shall be made in accordance with a payment schedule which shall be included in the grant award document. Nothing contained herein shall preclude the Commonwealth from requesting or being considered for additional funding for inspection/maintenance efforts; provided, however, that compliance with the terms of this Consent Decree shall not be conditioned upon the award of any such future funding.

11. For the purpose of insuring compliance with this Consent Decree, PennDOT shall submit reports to the parties listed in paragraph 14 describing all actions (including the status of franchise legislation) taken toward compliance with this Decree, beginning with a report postmarked no later than January 1, 1979 and continuing every three months thereafter until the commencement of mandatory inspection and voluntary maintenance, and a report every six months thereafter until the end of the first year of mandatory inspection and mandatory maintenance. Commencing with a report postmarked no later than ninety days following completion of the first year of mandatory inspection and mandatory maintenance and continuing every year thereafter, Defendant PennDOT shall submit reports for the previous year which include at least the following:

(a) The number of subject vehicles inspected in the inspection/maintenance program;

(b) The number of such subject vehicles whose exhaust emissions initially exceeded the exhaust emission standards for carbon monoxide and/or hydrocarbons, in total and by pollutant;

(c) The number of inspection stickers issued to subject vehicles and the number of subject vehicles registered.

12. The Commonwealth shall be allowed to institute a waiver of maintenance program, based on the establishment of maximum maintenance costs for certain subject vehicles, pursuant to regulations to be enacted by the Commonwealth. The Commonwealth shall make available to Plaintiffs evidence demonstrating the effect of such pro-

gram. However, Plaintiffs will have the right to challenge any reasonable waiver provision.

13. Jurisdiction is retained by this Court for the purpose of enabling any party to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for carrying out of this Consent Decree, for the modification or termination of any of the provisions herein upon a showing of changed circumstances and good cause, or for the enforcement of compliance therewith and the punishment of violations thereof.

14. All reports and other information that must be submitted to Plaintiffs in satisfaction of a requirement of this Consent Decree shall be sent to:

United States Environmental Protection Agency
Region III
6th and Walnut Streets
Philadelphia, Pennsylvania 19106
Attention: Director, Enforcement Division (3EN00)
United States Environmental Protection Agency
401 M. Street, S.W.
Washington, D.C. 20460
Attention: Director, Mobile Source Enforcement Division (EN-340)
United States Department of Justice
Land and National Resources Division
Washington, D.C. 20530
Attention: Chief, Pollution Control Section
Albert Slap, Esquire
Public Interest Law Center
1315 Walnut Street, 16th Floor
Philadelphia, Pennsylvania 19107

(Signatures appear on next page)

We hereby agree to the entry of the foregoing Consent Decree.

(s) Sanford Sagalkin
Sanford Sagalkin
Acting Assistant Attorney
General, Land and Natural Resources Division

(s) Peter F. Vaira
Peter F. Vaira
United States Attorney
Philadelphia, Pennsylvania

(s) Thomas A. Pursley, III
Thomas A. Pursley, III
Attorney for United States Department of Justice

(s) Robert S. Forster, Jr.
Robert S. Forster, Jr.
Assistant United States Attorney
Philadelphia, Pennsylvania

(s) Jack J. Schramm
Jack J. Schramm
Regional Administrator
United States Environmental
Protection Agency, Region III

(s) Albert J. Slap
Albert J. Slap
Public Interest Law Center of Philadelphia
Counsel for Plaintiffs in C.A. 76-2068

(s) John Hrubovcak
John Hrubovcak, Counsel for
Pennsylvania Department of Transportation

(s) Keith Welks
Keith Welks
Counsel for Pennsylvania,
Department of Environmental Resources

(s) B. R. Jackson
Benjamin R. Jackson
Acting Deputy Assistant
Administrator for Mobile Source
and Noise Enforcement, United States
Environmental Protection Agency

So ordered this 29th day of August, 1978.

(s) Louis C. Bechtle
Louis C. Bechtle, *J.*

SCHEDULE A

To the extent Schedule A is applicable by the terms of this Consent Decree, Defendant PennDOT shall implement the following schedule for a franchise inspection/maintenance program:

1. *September 15, 1978.* Submit to Plaintiffs a current copy of the legislation which Defendants intend to introduce in the Pennsylvania General Assembly.

2. *October 1, 1978.*

(A) Introduce legislation in the Pennsylvania General Assembly and submit a copy of such legislation to Plaintiffs.

(B) Commence development work on a Request for Proposals to establish an inspection/maintenance program in the Philadelphia and Pittsburgh areas.

(C) Commence development of standards, procedures, and regulations for the inspection/maintenance program, including:

(1) The hydrocarbon and carbon monoxide exhaust emission standards to be applied to each subject

vehicle, such standards to be consistent with the emission reductions specified in paragraph 7 of this Consent Decree.

(2) The requirement that, commencing twenty-one months after enactment of legislation, all subject vehicles be inspected once each year (but need not be maintained during the initial year) and in addition, commencing thirty-three months after enactment of legislation, that all subject vehicles whose emissions fail to meet the hydrocarbon and/or carbon monoxide emission standards, established according to paragraph 2(C) (1) of this schedule, be maintained and reinspected. If a single sticker system or a denial of registration enforcement mechanism is used by the Commonwealth, such maintenance and reinspection shall be required prior to the expiration of the inspection period in which the subject vehicle is initially inspected, such inspection period to be no longer than three months. If a double sticker system is used by the Commonwealth, such maintenance and re-inspection shall be required within three weeks of failure.

(3) Enforcement procedures applicable to owners of subject vehicles effective no later than twenty-one months after enactment of legislation, including at a minimum: (a) denial of registration by the Commonwealth to any subject vehicle which does not meet the requirements of paragraph 2(C) (2) of this schedule or an equally effective enforcement mechanism, such as the denial of a valid sticker signifying compliance with the inspection/maintenance program; (b) the prohibition of operation on the public roads of any vehicle which does not meet the re-

quirements of paragraph 2(C)(2) of this schedule, with adequate enforcement thereof and monetary sanctions for operation of such vehicles at least equal in amount to those assessed against the owners of vehicles in violation of the inspection program presently in operation in the Commonwealth.

(4) If the Commonwealth authorizes inspections by fleet operators and motor vehicle dealers, the following shall also be developed:

(A) A description of quality control procedures to be utilized by the Commonwealth, including periodic on-site visits by the Commonwealth to inspection facilities, instrument calibration checks, and inspection of records.

(B) The requirements for the certification of such fleet operators and motor vehicle dealers as inspection facilities which shall at a minimum require that:

(1) the facility has emission analyzer equipment authorized under Commonwealth regulations,

(2) the facility employs at least one person who has received training in the proper use of such equipment and in inspection procedures, and who has demonstrated proficiency in such usage and procedures,

(3) the facility agrees to maintain, and periodically submit to the Commonwealth, records adequately describing: all vehicles inspected, the exhaust emission levels measured at each inspection and reinspection of such vehicles, and the calibration of testing equipment.

(C) Minimum requirements for exhaust emission analyzer equipment, the calibration of such equipment, and testing procedures.

3. *July 1, 1979.* Submit to Plaintiffs a draft copy of the Request for Proposals.

4. *Two months after the enactment of legislation.* Issue to potential contractors the Request for Proposals and submit this document to Plaintiffs.

5. *Five months after the enactment of legislation.* Submit to Plaintiffs a copy of the proposal selected by the Commonwealth for implementation of the inspection/maintenance program.

6. *Six months after the enactment of legislation.*

(A) Submit to Plaintiffs a copy of the signed contract between the Commonwealth and the contractor. This contract shall, among other things, require the contractor to make the inspection records available to the Commonwealth, require the contractor to perform instrument calibration checks and allow the Commonwealth to inspect the premises of the contractor.

(B) Propose inspection/maintenance regulations by publication in the Pennsylvania Bulletin, and submit to Plaintiffs those regulations and other standards and procedures, for the inspection/maintenance program which, at a minimum, include the provisions listed in paragraph 2(C) of this schedule. Defendants shall also submit to Plaintiffs documentation that the proposed exhaust emission standards are consistent with the emission reductions specified in paragraph 7 of this Consent Decree.

7. *Eight months after enactment of legislation.* Adopt, and submit to Plaintiffs, final standards, proce-

dures, and regulations for the inspection/maintenance program, which, at a minimum, include the provisions listed in paragraph 2 (C) of this schedule.

8. *Fifteen months after enactment of legislation.*

(A) Commence a program to train automobile repair mechanics in the requirements of the inspection/maintenance program and the proper means of maintaining and repairing vehicles to meet such program requirements.

(B) Commence a program to inform the public and the automotive repair industry of the inspection/maintenance program.

9. *Twenty-one months after enactment of legislation.* Commence mandatory annual inspection and voluntary maintenance of all subject vehicles, all such vehicles to be inspected at least once by the end of the 32nd month after the enactment of legislation.

10. *Thirty-three months after enactment of legislation.* Commence the period of mandatory annual inspection of all subject vehicles and mandatory maintenance and re-inspection of all such vehicles which fail to meet the exhaust emission standards of the inspection/maintenance program. If a single sticker system or a denial of registration enforcement mechanism is used by the Commonwealth, such maintenance and re-inspection shall be required prior to the expiration of the inspection period in which the subject vehicle is initially inspected, such inspection period to be no longer than three months. If a double sticker system is used by the Commonwealth, such maintenance and re-inspection shall be required within three weeks of failure.

SCHEDULE B

To the extent Schedule B is applicable by the terms of this Consent Decree, Defendant PennDOT shall implement the following schedule for a private garage inspection/ maintenance program:

1. *October 1, 1978.* Commence development of standards, procedures, and regulations for the inspection/ maintenance program, including at a minimum:

(A) The hydrocarbon and carbon monoxide exhaust emission standards to be applied to each subject vehicle, such standards to be consistent with the emissions reductions specified in paragraph 7 of this Consent Decree.

(B) The requirement that commencing August 1, 1980, all subject vehicles be inspected once by Janury 31, 1981; and in addition, that commencing February 1, 1981, all subject vehicles be inspected once each year and that all subject vehicles whose emissions fail to meet the hydrocarbon and/or carbon monoxide emission standards, established according to paragraph 1 (A) of this schedule be maintained and re-inspected prior to the expiration of the inspection period in which the subject vehicle is inspected, such inspection period to be no longer than three months.

(C) Enforcement procedures applicable to owners of subject vehicles, effective no later than August 1, 1980, including: (1) the denial of a valid sticker signifying compliance with the inspection/maintenance program to any subject vehicle which does not meet the requirements of paragraph 1 (B) of this schedule; (2) the prohibition of operation on the public roads of any vehicle which does not meet the requirements of paragraph 1 (B) of this sched-

ule, with adequate enforcement thereof and monetary sanctions for operation of such vehicles at least equal in amount to those assessed against the owners of vehicles in violation of the inspection program presently in operation in the Commonwealth.

(D) A description of quality control procedures to be utilized by the Commonwealth, including periodic on-site visits by the Commonwealth to inspection facilities, instrument calibration checks, and inspection of records.

(E) The requirements for the certification of private garages as inspection facilities which shall at a minimum require that:

(1) the facility has emission analyzer equipment authorized under Commonwealth regulations,

(2) the facility employs at least one person who has received training in the proper use of such equipment and in inspection procedures, and who has demonstrated proficiency in such usage and procedures,

(3) the facility agrees to maintain, and periodically submit to the Commonwealth, records, adequately describing: all vehicles inspected, the exhaust emission levels measured at each inspection and reinspection of such vehicles, and the calibration of testing equipment.

(F) Minimum requirements for exhaust emission analyzer equipment, the calibration of such equipment, and testing procedures.

2. *July 1, 1979.* Propose inspection/maintenance regulations by publication in the Pennsylvania Bulletin, and submit to Plaintiffs, those regulations and other stan-

dards and procedures, or the inspection/maintenance program which at a minimum include the provisions listed in paragraph 1 of this schedule. Defendants shall also submit to Plaintiffs documentation that the proposed exhaust emission standards are consistent with the emission reductions specified in paragraph 7 of this Consent Decree.

3. *September 1, 1979.*

(A) Adopt, and submit to Plaintiffs, standards, procedures, and regulations for the inspection/maintenance program which at a minimum include the provisions listed in paragraph 1 of this schedule.

(B) Commence notification to potential inspection facilities, inspectors, and inspector training facilities concerning the inspection/maintenance program, and submit a copy of such notification to Plaintiffs.

4. *November 1, 1979.*

(A) Commence the certification of inspection facilities which meet the requirements of the adopted standards, procedures, and regulations of the inspection/maintenance program.

(B) Commence a program to train inspectors in the requirements of the inspection/maintenance program, the proper use of exhaust emission analyzer equipment, and inspection procedures, and to certify their proficiency and knowledge therein.

5. *February 1, 1980.* Commence a program to inform the public of the inspection/maintenance program.

6. *July 1, 1980.* Submit to Plaintiffs adopted policies for providing, as a consumer protection mechanism, facilities where official confirming inspections may be

conducted independent of certified private garages (i.e., at least one facility in the Philadelphia area and one facility in the Pittsburgh area as the base system, with operation of other facilities at the sole discretion of PennDOT), or an equally effective alternative, such as timely consumer complaint investigations by Commonwealth employees. These employees would return to the inspection station in question with the complainant to verify the inspection procedures, to verify the calibration of the analyzer and to supervise the retest of the vehicle in question. These policies would be effective by February 1, 1981. Defendant PennDOT will maintain and make available to Plaintiffs such records as are adequate to demonstrate the effectiveness of this mechanism.

7. *August 1, 1980.* Commence the period of mandatory annual inspection and voluntary maintenance of all subject vehicles, all such vehicles to be inspected once by January 31, 1981, and commence a program to train mechanics in the proper means of repairing vehicles to meet the requirements of the inspection/maintenance program.

8. *February 1, 1981.* Commence the periods of mandatory annual inspection of all subject vehicles and mandatory maintenance and re-inspection of all such vehicles which fail to meet the exhaust emission standards of the inspection/maintenance program prior to the expiration of the inspection period in which the subject vehicle is inspected, such inspection period to be no longer than three months.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Actions No. 76-2068 and No. 77-619

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, et al.,

Plaintiffs

vs.

COMMONWEALTH OF PENNSYLVANIA, et al.,

Defendants

UNITED STATES OF AMERICA,

Plaintiff

vs.

COMMONWEALTH OF PENNSYLVANIA, et al.

Defendants

MODIFICATION OF CONSENT DECREE

WHEREAS, a Consent Decree was entered on August 30, 1978, as the most beneficial means to resolve this litigation; and

WHEREAS, all parties agree that modifications are necessary to the Consent Decree in order to assure timely implementation of an effective inspection/maintenance program in affected areas of the Commonwealth.

NOW THEREFORE, upon the consent of the parties by their respective attorneys and authorized officials, it is hereby ORDERED, ADJUDGED, and DECREED that the August 30, 1978 Consent Decree shall be modified as follows:

"SCHEDULE B

To the extent Schedule B is applicable by the terms of this Consent Decree, Defendant PennDOT shall implement the following schedule for a private garage inspection/maintenance program:

1. *October 1, 1978.* Commence development of standards, procedures, and regulations for the inspection/maintenance program, including at a minimum:

(A) The hydrocarbon and carbon monoxide exhaust emission standards to be applied to each subject vehicle, such standards to be consistent with the emissions reductions specified in paragraph 7 of this Consent Decree.

(B) The requirement that commencing August 1, 1980, all subject vehicles be inspected once by January 31, 1981; and in addition, that commencing February 1, 1981, all subject vehicles be inspected once each year and that all subject vehicles whose emissions fail to meet the hydrocarbon and/or carbon monoxide emission standards, established according to paragraph 1 (A) of this schedule be maintained and re-inspected prior to the expiration of the inspection period to be no longer than three months.

(C) Enforcement procedures applicable to owners of subject vehicles, effective no later than August 1, 1980, including: (1) the denial of a valid sticker signifying compliance with the inspection/maintenance program to any subject vehicle which does not meet the requirements of

paragraph 1 (B) of this schedule; (2) the prohibition of operation on the public roads of any vehicle which does not meet the requirements of paragraph 1 (B) of this schedule, with adequate enforcement thereof and monetary sanctions for operation of such vehicles at least equal in amount to those assessed against the owners of vehicles in violation of the inspection program presently in operation in the Commonwealth.

(D) A description of quality control procedures to be utilized by the Commonwealth, including periodic on-site visits by the Commonwealth to inspection facilities, instrument calibration checks, and inspection of records. Periodic visits shall be unannounced and occur at least once every three (3) months for each inspection facility, unless the qaulity control procedures are modified pursuant to paragraphs 4, 6 and 8 of this schedule.

(E) The requirements for the certification of private garages as inspection facilities which shall at a minimum require that:

(1) the facility has emission analyzer equipment authorized under Commonwealth regulations,

(2) the facility employs at least one person who has received training in the proper use of such equipment and in inspection procedures, and who has demonstrated proficiency in such usage and procedures,

(3) the facility agrees to maintain, and periodically submit to the Commonwealth, records adequately describing: all vehicles inspected, the exhaust emission levels measured at each inspection and re-inspection of such vehicles, and the calibration of testing equipment.

(F) Minimum requirements for exhaust emission analyzer equipment, the calibration of such equipment, and testing procedures.

2. *July 1, 1979.* Propose inspection/maintenance regulations by publication in the Pennsylvania Bulletin, and submit to Plaintiffs, those regulations and other standards and procedures, for the inspection/maintenance program which at a minimum include the provisions listed in paragraph 1 of this schedule. Defendants shall also submit to Plaintiffs documentation that the proposed exhaust emission standards are consistent with the emission reductions specified in paragraph 7 of this Consent Decree.

3. *September 1, 1979.*

(A) Adopt, and submit to Plaintiffs, standards, procedures and regulations for the inspection/maintenance program which at a minimum include the provisions listed in paragraph 1 of this schedule.

(B) Commence notification to potential inspection facilities, inspectors, and inspector training facilities concerning the inspection/maintenance program, and submit a copy of such notification to Plaintiffs.

4. *February 1, 1980.* Commence study to determine the quality control procedures as effective as the results of monthly on-site visits by the Commonwealth to inspect facilities, check instrument calibrations and inspect records. Such study shall consider the cost-effectiveness of the quality control procedures and include recommendations as to the frequency of periodic on-site visits and whether they should be supplemented by random on-site visits. Such study shall also examine the quality control programs recommended or used in other states with operating or proposed private garage systems.

5. *May 1, 1980.*

(A) Commence the certification of inspection facilities which meet the requirements of the adopted standards, procedures, and regulations of the inspection/maintenance program.

(B) Commence a program to train inspectors in the requirements of the inspection/maintenance program, the proper use of exhaust emission analyzer equipment, and inspection procedures, and to certify their proficiency and knowledge therein.

6. *August 1, 1980.* Submit study of quality control procedures, including recommendations and supporting data, to Plaintiffs for review and comment. Submit the Commonwealth's proposed modifications, if any, of the procedures adopted pursuant to paragraph 1 (D) of this schedule.

7. *November 1, 1980.* Commence a program to inform the public of the inspection/maintenance program. A detailed outline of this program shall be submitted to Plaintiffs by October 1, 1980.

8. *December 1, 1980.* Submit to Plaintiffs final modifications, if any, of the procedures adopted pursuant to paragraph 1 (D) of this schedule. Plaintiffs reserve the right to challenge any such procedures which are not as effective as the results of monthly on-site visits by the Commonwealth.

9. *January 1, 1981.* Submit to Plaintiffs adopted policies for providing, as a consumer protection mechanism, facilities where official confirming inspections may be conducted independent of certified private garages (i.e., at least one facility in the Philadelphia area and one facility in the Pittsburgh area as the base system, with operation of

other facilities at the sole discretion of PennDOT), or an equally effective alternative, such as timely consumer complaint investigations by Commonwealth employees. These employees would return to the inspection station in question with the complainant to verify the inspection procedures, to verify the calibration of the analyzer and to supervise the retest of the vehicle in question. These policies would be effective by November 1, 1981. Defendant PennDOT will maintain and make available to Plaintiffs such records as are adequate to demonstrate the effectiveness of this mechanism.

10. *May 1, 1981.* Commence the period of mandatory annual inspection and voluntary maintenance of all subject vehicles, all such vehicles to be inspected once by October 31, 1981, and commence a program to train mechanics in the proper means of repairing vehicles to meet the requirements of the inspection/maintenance program.

11. *November 1, 1981.* Commence the period of mandatory annual inspection of all subject vehicles and mandatory maintenance and re-inspection of all such vehicles which fail to meet the exhaust emission standards of the inspection/maintenance program prior to the expiration of the inspection period in which the subject vehicle is inspected, such inspection period to be no longer than three months.

12. *January 1, 1982.* Submit a report evaluating the effectiveness of the quality control procedures of the I/M program. Such report shall include a summary of the exhaust emission analyzer calibration data obtained by Defendant PennDOT from the on-site visits of official inspection stations and from the calibration reports submitted by the stations to Defendant PennDOT.

13. *January 1, 1983.* Submit a second report evaluating the effectiveness of the quality control procedures of the I/M program, as set forth in the preceding paragraph."

We hereby agree to the entry of the foregoing Modification of Consent Decree.

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James W. Moorman
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Land and Natural Resources Division
U.S. Department of Justice

(s) Peter F. Vaira
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(s) Benjamin R. Jackson
Benjamin R. Jackson
Deputy Assistant
Administrator for Mobile Source and
Noise Enforcement,
U.S. Environmental Protection Agency

(s) Jerome Balter
Jerome Balter
Public Interest Law
Center of Philadelphia

So Ordered this 7th day of March, 1980.

(s) Louis C. Bechtle
Louis C. Bechtle, *J.*

Office - Supreme Court, U.S.
FILED
OCT 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-274

IN THE

Supreme Court of the United States

October Term, 1982

COMMONWEALTH OF PENNSYLVANIA, et al.,
Petitioners

v.

DELAWARE VALLEY CITIZENS COUNCIL FOR CLEAN AIR, et al.

and

UNITED STATES OF AMERICA,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF DELAWARE VALLEY CITIZENS COUNCIL, ET AL.

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COUNTER-STATEMENT OF PETITIONERS' QUESTIONS

1. Whether a state which fails to comply with a consent decree judgment can be held in civil contempt?

2. Whether a court can impose a civil contempt sanction modeled on a statutory administrative sanction?

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No. 82-274

IN THE

Supreme Court of the United States

October Term, 1982

COMMONWEALTH OF PENNSYLVANIA, et al.,
Petitioners

v.

DELAWARE VALLEY CITIZENS COUNCIL FOR CLEAN AIR, et al.

and

UNITED STATES OF AMERICA,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF DELAWARE VALLEY CITIZENS COUNCIL FOR CLEAN AIR, et al.

Respondents, the Delaware Valley Citizens Council for Clean Air, et al., respectfully request the Court to deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Third Circuit reported at 678 F. 2d 470 (3d Cir. 1982) which is reproduced in petitioners' Appendix at 50a to 68a.

COUNTER-STATEMENT OF THE CASE

In accordance with the federal Clean Air Act of 1970,[1] the Administrator of the U. S. Environmental Protection Agency (EPA) promulgated the Pennsylvania Transportation Control Plan (TCP). 38 Fed. Reg. 32884 (11/28/73), 40 CFR 52.2037 et seq. The TCP is the phase of Pennsylvania's overall State Implementation Plan (SIP) intended to reduce harmful emissions of carbon monoxide and ozone-forming hydrocarbons from mobile sources and thereby to help attain compliance with EPA's national ambient air quality standards for those pollutants.

The TCP promulgated by the EPA included an auto emissions inspection and maintenance (I/M) program which was to be implemented by May 1, 1975. 40 CFR 52.2038.[2] Even before the EPA promulgated the I/M program requirement the Pennsylvania legislature, in 1972, had authorized the Pennsylvania Department of Transportation to establish such a program. Act #154 (6/16/72), 75 P. S. 834. And the Commonwealth did not seek court review of the I/M program requirement or of the I/M program implementation date though the Commonwealth had petitioned for court review of other aspects of the TCP. *Commonwealth of Pennsylvania v. Environmental Protection Agency*, 500 F. 2d 246 (3d Cir. 1974).

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1. When enacted in 1970 the Clean Air Act was codified at 42 U. S. C. § 1857, et seq. With passage of the 1977 Amendments the Act was recodified at 42 U. S. C. § 7401, et seq. All references to the Clean Air Act are based on the post 1977 recodification.

2. Under the Clean Air Act of 1970 the inclusion of an I/M program in a state SIP was optional with the state. Under the Clean Air Act Amendments of 1977 the inclusion of an I/M program was mandatory for Pennsylvania and other states which could not attain carbon monoxide or ozone standards by December 31, 1982.

When the Commonwealth failed to implement the I/M program by mid-1976 the Delaware Valley Citizens' Council for Clean Air (Delaware Valley) brought a citizens lawsuit under 42 U. S. C. § 7604, against the Commonwealth defendants and the EPA. Early in 197. the EPA instituted its own action against the same Commonwealth defendants and the EPA was dismissed as a defendant in the former action. The actions were then consolidated.

The parties engaged in extended discovery and negotiations to resolve the case. While these negotiations were proceeding Congress enacted the Clean Air Act Amendments of 1977, P. L. 95-95 (8/7/77). A significant aspect of the 1977 Amendments was the enactment of Part D, §§ 171-178 inclusive, 42 U. S. C. §§ 7501-7508, which concerned regions of the nation that had not attained compliance with EPA's ambient air standards. Under Part D the Commonwealth was required to implement an I/M program, 42 U. S. C. § 7502(b)(11)(B), to qualify for certain federal-aid highway grants, 42 U. S. C. § 7506(a).

The parties entered into a consent decree in August 1978 which obligated the defendants to implement an I/M program [3] in those areas of Pennsylvania where the Commonwealth would not be able to attain national air quality standards by December 31, 1982. At the time the consent decree was filed legislative authorization for an I/M program already existed. *Burd v. Commonwealth of Pennsylvania*, 443 A. 2d 1197 (Pa. Cmwlth. Ct. 1982).

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3. The consent decree of August 1978 required the defendants to implement the I/M program by August 1, 1980. Subsequently the consent decree was modified and the date of implementation was set at May 1, 1981.

In June 1979 the Commonwealth submitted a revised Transportation Control Plan (TCP) to the EPA in order to qualify for federal-aid highway grants. 42 U. S. C. 7506(a)(3). In its TCP submission to EPA the Commonwealth explicitly pledged to implement an I/M program in accordance with the consent decree and the Commonwealth also pledged to provide the necessary funds to operate the program. These pledges qualified the Commonwealth for federal-aid highway grants after July 31, 1979. 45 Fed. Reg. 33607 et seq. (5/20/80). According to the Federal Highway Administration the Commonwealth, since July 31, 1979, has received federal-aid highway grants exceeding one billion dollars, grants which would have been withheld but for the Commonwealth's pledges.

Just two days before the Commonwealth was to implement the I/M program; i.e., on April 29, 1981, the defendants moved to modify the consent decree so as to delay the I/M program start-up until January 1, 1983. The district court denied the motion, declared the defendants to be in violation of the consent decree,[4] and the Court of Appeals affirmed.[5]

The failure of the defendants to meet their consent decree obligations necessitated a further decree modification. Accordingly, on June 16, 1981, the district court modified the consent decree [6] and established May 1, 1982 as the new start-up date. At the time of the June 16 order the Pennsylvania legislature had already authorized the executive branch to implement an I/M program, *Burd v.*

4. *DVCCCA v. Commonwealth*, #76-2068 (E. D. Pa., 5/20/81).

5. *DVCCCA v. Commonwealth*, 674 F. 2d 976 (3d Cir. 3/1/82). Petition for cert. pending, No. 81-2331.

6. *DVCCCA v. Commonwealth*, #76-2068 (E. D. Pa. 6/16/81).

Commonwealth of Pennsylvania, 443 A. 2d 1197 (Pa. Cmwlth. Ct. 1982), and the legislature had appropriated funds for the program in fiscal years 1980, 1981, 1982. Indeed, just one week before the district court order of June 16, 1981 both houses of the Pennsylvania General Assembly had passed the 1981-82 appropriations budget, House Bill 686-5A (1981) (7/1/81), which included funding for the I/M program.

Notwithstanding the legislature's prior authorization and appropriation for the I/M program and notwithstanding the district court's June 16 order, on October 6, 1981, the legislature voted to override Governor Thornburgh's veto and enacted House Bill 456, § 2, Act 99-1981, 71 P. S. 523, which prohibited the expenditure of any funds for the I/M program. Thereafter the defendants stopped all their activities in connection with the consent decree and the district court, on January 22, 1982,[7] declared them to be in civil contempt. The coercive contempt sanction imposed by the court enjoined the U. S. Secretary of Transportation from approving certain grants for federal-aid highway funds under Title 23, U. S. Code, in the Pennsylvania counties covered by the consent decree, except in respect to highway construction for safety, mass transit or transportation projects related to air quality improvements or maintenance. Appendix, p. 32a.

The court order of January 22, 1982 was unanimously affirmed by the Third Circuit, 678 F. 2d 470 (3d Cir. 5/21/82). On September 9, 1982 the Supreme Court denied the defendants petition for a stay (Stay Petition A-103). The defendants now seek a writ of certiorari to review the Third Circuit's affirmation.

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7. *DVCCCA v. Commonwealth*, 533 F. Supp. 869 (E. D. Pa. 1982). See Appendix p. 1a.

REASONS FOR DENYING THE WRIT

Summary

Petitioners seek to challenge the validity of a civil contempt citation and the accompanying contempt sanction, both affirmed unanimously by the Third Circuit. A recitation of the material facts reveals why the citation and the sanction were within the discretion of the district court and fully justified.

Petitioners, including the Commonwealth, entered into a consent decree in 1978 obligating them to implement an auto emission inspection and maintenance (I/M) program by May 1981 to abate air pollution problems. The Commonwealth's legislature authorized such an I/M program in 1972.

In 1979, to qualify for federal-aid highway grants the petitioners made an additional pledge to implement the I/M program of the consent decree. This additional pledge has brought the Commonwealth over one billion dollars in federal-aid highway grants. Notwithstanding, petitioners failed to implement the I/M program in May 1981 and were declared to be in violation of the decree. No sanction was applied and the start-up date was rescheduled to May 1982.

Though the Commonwealth's legislature had appropriated funds for the I/M program in fiscal 1980, 1981, and 1982 the legislature in October 1981 voted to immediately prohibit the expenditure of any public funds for the I/M program. The petitioners were declared to be in civil contempt and, as a sanction, the U. S. Secretary of Transportation was enjoined from approving certain federal-aid highway grants. This sanction, modeled after a provision in the Clean Air Act, minimizes interference with the internal operations of commonwealth functions while maintaining the enforceability of the consent decree.

Petitioners have not offered a single case on the issue of the contempt or on the issue of the contempt sanction which has material facts even remotely comparable to these material facts. Therefore, there is no conflict between the Third Circuit and the other Circuits. Since petitioners have presented no other reasons which would warrant the granting of a Writ the petition should be denied.

A. District Court Did Not Commit Error in Declaring Commonwealth Defendants to Be in Civil Contempt.

A party violating a consent decree judgment is subject to the same powers by which a court protects all its judgments including the power of contempt under 18 U. S. C. § 401. *Interdynamics, Inc. v. Wolf*, 653 F. 2d 93, 96-96 (3d Cir. 1981). And state defendants who violate consent decree judgments are not immune from contempt citations. *Hutto v. Finney*, 437 U. S. 678, 690-91 (1978); *Vecchione v. Wohlgemuth*, 558 F. 2d 150, 158 (3d Cir. 1977), *cert. den.* 434 U. S. 943 (1977).

The named defendants in these consolidated actions are the Commonwealth of Pennsylvania,[8] the Secretary of the Pennsylvania Department of Transportation (PennDOT) and the Secretary of the Department of Environmental Resources (PennDER). They were all declared

8. The Commonwealth of Pennsylvania incorporates both the executive and legislative branches of government. Because the Commonwealth is the Sovereign it is immunized from actions brought in federal court by the 11th Amendment, *Edelman v. Jordan*, 415 U. S. 651 (1974), except in cases where the United States is the plaintiff, *United States v. Mississippi*, 380 U. S. 128, 140-141 (1965), or in cases where there has been a final judgment, *Toll v. Moreno*, — U. S. —, 50 U. S. L. W. 4380, 4384 (6/23/82). The executive officer defendants are not immunized by the 11th Amendment in respect to prospective relief. *Edelman v. Jordan*, *supra*.

to be in civil contempt for failure to comply with their consent decree obligations to implement an I/M program because the Commonwealth was "physically, practically and financially able to comply . . ." *D. V. C. C. C. A. v. Commonwealth*, 533 F. Supp. 869, 881 (E. D. Pa. 1982) (Appendix, p. 22a).

The defendants contend that the contempt citation should be reversed because: (1) it impermissibly "interfere[s] with the state's right to control its own legislative process" (Pet. Br. p. 10); (2) it conflicts with the view of *New York State Ass'n for Retarded Children, Inc. v. Carey*, 631 F. 2d 1162 (2d Cir. 1980) (Pet. Br. p. 17); and (3) it was impossible for defendants to comply. The defendants allegations are incorrect in all three respects.

1. The District Court's Contempt Citation Does Not Interfere With the Commonwealth's Appropriation Process.

The consent decree of August 28, 1978 provided that:

> "The provision of this Consent Decree apply to the Defendants *Commonwealth of Pennsylvania*, Secretary of PennDOT and the Secretary of PennDER and to each of the officers, agents, employees and successors of said parties." (Emphasis added)

Consent Decree, para. 2. The Commonwealth was represented throughout this action by the Pennsylvania Department of Justice, the Department which had the power and duty to represent the Commonwealth.[9] *Vecchione*

9. The Pennsylvania Administrative Code § 903, 71 P. S. 293, which was in effect when this action was initiated and when the consent decree was entered, provided in relevant part, as follows:

> "The Department of Justice shall have the power, and *its duty shall be:*
>
> • • •

v. Wohlgemuth, 558 F. 2d 943 (1977); *D. V. C. C. C. A. v. Commonwealth*, 674 F. 2d 970 (3rd Cir. 1982).

Not only was the Department of Justice authorized to represent the Commonwealth in this action, it was also authorized to agree, on behalf of the Commonwealth, to undertake an I/M program because the legislature had already enacted legislation authorizing the executive branch to implement I/M. *Burd v. Commonwealth of Pennsylvania*, 443 A. 2d 1197 (Pa. Cmwlth. Ct. 1982). And by way of endorsing the consent decree the legislature, thereafter, had appropriated funds for I/M program implementation in the budgets for fiscal years 1980, 1981 and 1982. Thus there can be no meaningful challenge to the validity of the consent decree.

Though the defendants do not challenge the validity of the decree they argue, rather, that it is unenforceable. (Pet. Br., p. 11). They argue, in effect, that any final judgment, even a consent decree voluntarily entered into by the Commonwealth, constitutes an obligation only to the extent which the Commonwealth unilaterally wishes to assume. Such a view of the obligations of a federal judgment is contrary to the principle of separation of powers, *Commonwealth v. Sutley*, 378 A. 2d 780, 784 (Pa 1977); is contrary to the Supremacy Clause, United States Constitution, Article VI Cl. 2, *United States v. Peters*, 9 U. S. 115, 136 (1809); *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 442 U. S. 658, 695 (1979); and is contrary to the Contract Clause, U. S. Constitution Article I Section 10 Cl. 1, and to the Contract Clause of the Pennsylvania Constitution, Article 1, Section 17.

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9. (Cont'd.)

(b) To represent the Commonwealth . . . in any litigation to which the Commonwealth . . . may be a party." (Emphasis added)

Subsequent to the consent decree the Commonwealth used the decree to qualify for conditioned federal-aid highway funds under Section 176(a), Clean Air Act, 42 U. S. C. 7506(a), (see section B(1) infra). Based on this qualification the Commonwealth since 1979 has received more than one billion dollars in highway construction funds.[10] The defendants' contention that the consent decree is unenforceable despite these circumstances makes a mockery of the consent decree and would suggest that the Commonwealth was guilty of deception in accepting the conditioned federal-aid highway funds. *Cf. Euresti v. Stenner*, 458 F. 2d 1115 (10th Cir. 1972).

Undaunted, the defendants also allege that the contempt order interferes with the Commonwealth's right to control its own appropriation process and thereby it transgresses the principle of federalism (Pet. Br. p. 10-13). The defendants, apparently, overlooked the district court's refusal to invalidate HB 456 precisely because the court declined to interfere with the Commonwealth's appropriation process. (Appendix, p. 19a, n. 8) and because the Court was fully aware of the admonitions in *National League of Cities v. Usery*, 426 U. S. 833 (1976). Indeed, the sanction imposed by the court scrupulously avoids any requirement that the Commonwealth appropriate any funds to implement the I/M program. Any complaint, therefore, that the contempt citation interferes with the Commonwealth's appropriation process has a hollow ring.

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10. There can be no doubt that the Commonwealth's legislature has been fully aware of the receipt of these conditioned funds because the legislature has controlled and appropriated these funds since 1979. *Shapp v. Sloane*, 391 A. 2d 595, 606 (Pa. 1978), *appeal dismissed sub nom., Thornburgh v. Casey*, 440 U. S. 942 (1979); Pa. Const. Article 3, Section 24.

2. The District Court's Contempt Citation Is Not in Conflict With *New York State Ass'n For Retarded Children, Inc. v. Carey*, 631 F. 2d 162 (2nd Cir. 1980).

Defendants allege that the I/M case contempt citation conflicts with *New York State Ass'n For Retarded Children, Inc. v. Carey*, 631 F. 2d 162 (2d Cir. 1980). (Pet. Br. p. 17). Analysis reveals, however, that significant differences in the material facts between these cases accounts for their respective outcomes.

In *Carey* state executive officers, but not the state, entered into a consent decree obligating the officers to seek legislative funding for a hospital Review Panel created by the decree. When the legislature refused to appropriate funds for the Review Panel the district court threatened to declare the officers in contempt and to impose appropriate sanctions if funding was not provided. *New York State Ass'n For Retarded Children, Inc. v. Carey*, 492 F. Supp. 1110, 1115 (E. D. N. Y. 1980). The Second Circuit reversed on the ground that defendants, in fact, had fulfilled their decree obligation to seek legislative funding. 631 F. 2d at 166. Since the state was not a defendant nor a party to the consent decree the Second Circuit had no occasion to discuss the legal implications of such a circumstance.

In contrast to *Carey*, the I/M defendants did include the Commonwealth in addition to the state executive officers; and in contrast to *Carey* the I/M consent decree expresses the defendants' obligations in mandatory rather than precatory terms. Thus the I/M consent decree does not request the defendants to seek funding for the I/M program but, instead, it mandates that the defendants shall implement the program by a date certain.[11] And

11. The consent decree, paragraph 4, provides that "Defendant PennDOT shall immediately proceed toward implementation of a

in further contrast to *Carey*, where the state legislature had not authorized the establishment of the hospital Review Panel, the Pennsylvania legislature had in fact already authorized the I/M program when the parties entered into the consent decree.

Additionally, the consent decree pledge of the defendants to implement the I/M program served to qualify the Commonwealth for a billion dollars in conditioned federal-aid highway funds under Section 176(a) of the Clean Air Act Amendments of 1977, 42 U. S. C. 7506(a). (See section B(1) infra). In contrast, the *Carey* consent decree was not the predicate for receiving any conditioned federal funds and no federal funds had been provided to the state as a consequence of the *Carey* consent decree.

In sum, the material facts in *Carey* are so substantially different from those in the I/M case that there can be no basis for considering the Third Circuit's I/M opinion to be in conflict with the Second Circuit's opinion in *Carey*.

3. The Commonwealth's Self Imposed Inability to Comply With the Consent Decree Does Not Excuse Its Civil Contempt.

The inability of a defendant to comply with a judgment is well recognized as a defense to a charge of civil contempt. *Maggio v. Zietz*, 330 U. S. 56 (1948), *Shillitani v. United States*, 384 U. S. 364 (1966). But the defense of impossibility rests on circumstances beyond the control of the defendant.

The failure of the defendants to comply with the consent decree judgment resulted from the enactment of

11. (Cont'd.)

private garage [I/M program] system" if the legislature does not authorize a franchise system by July 1, 1979.

HB 456, a circumstance fully within the control of the Commonwealth. Thus, the circumstances precluding compliance with the consent decree is not beyond the control of the Commonwealth and therefore cannot serve to protect the defendants from the contempt citation.

B. The Contempt Sanction Does Not Abuse the Court's Discretion Nor Does It Conflict With Decisions of the Other Circuits.

District courts are empowered to impose coercive sanctions in cases of civil contempt. *United States v. United Mine Workers of America*, 330 U. S. 258, 303-4 (1947). In fashioning a contempt sanction a court sits in equity with wide discretion to blend "what is necessary, what is fair, and what is workable." *Lemon v. Kurtzman*, 411 U. S. 192, 200 (1973).

• • •

The district court (Bechtle, J.) was particularly careful to fashion a contempt sanction which would fully respect the sovereign rights of the Commonwealth while simultaneously coercing the Commonwealth to purge its contempt. The sanction chosen (Appendix p. 32a) accomplished these objectives. It enjoined the U. S. Secretary of Transportation from awarding grants of federal-aid highway funds, with certain exceptions, for the 10 counties affected by the lawsuit; but it did not impose any affirmative obligations on the Commonwealth nor did it require the Commonwealth to expend any funds. Admittedly, the sanction was modeled after Section 176(a) of the Clean Air Act, 42 U. S. C. 7506(a).

Notwithstanding, defendants contend the sanction is an abuse of the court's discretion because: (1) the court has no power to enjoin federal-aid highway funds (Pet. Br. p. 19); (2) the court cannot impose a sanction which

affects the public (Pet. Br. p. 23); and (3) the court invalidly intrudes on the operations of the Commonwealth (Pet. Br. p. 26).

The Commonwealth's allegations are incorrect.

1. The Contempt Sanction Does Not Conflict With *State Highway Commission of Missouri v. Volpe*, 479 F. 2d 1099 (8th Cir. 1973).

Contrary to the defendant's allegation, *State Highway Commission of Missouri v. Volpe*, 479 F. 2d 1099 (8th Cir. 1973) is not relevant to the contempt sanction imposed on the Commonwealth defendants. *Volpe* held that the executive branch of the federal government did not have the authority to impound federal-aid highway funds for the purpose of curbing inflation, 479 F. 2d at 1108, because the Constitution granted the power to appropriate funds for road construction to the Congress, U. S. Const. Article 1, Section 8, Clause 6, and Congress had not granted the executive a discretionary right to withhold these appropriations for purposes remote and unrelated to highway construction.

In contrast to *Volpe*, the district court's sanction withholding certain federal aid highway funds was fully in accord with Section 176(a) of the Clean Air Act, 42 U. S. C. 7506(a),[12] wherein Congress conditioned federal-

12. Section 176(a), 42 U. S. C. 7506(a) provides as follows: The Administrator shall not approve any projects or award any grants authorized by this Act and the Secretary of Transportation shall not approve any projects or award any grants under title 23, United States Code, other than for safety, mass transit, or transportation improvement projects related to air quality improvement or maintenance, in any air quality control region—

(1) in which any national primary ambient air quality standard has not been attained,

aid highway grant approvals on state implementation of an I/M program, 42 U. S. C. 7502(b)(11)(B) and state commitment to finance that program. 42 U. S. C. 7502 (b)(7). Legislative enactment of HB 456 constituted a rescission of the Commonwealth's pledge to implement the I/M program required by the consent decree. Thus the contempt sanction cutting-off highway funds was in keeping with Congressional intent and purpose. It follows, therefore, that the consent decree injunction is in no fashion comparable to the executive branch impoundment of funds at issue in *Volpe*.

Defendants also allege that the district court was not empowered to impose Section 176(a) sanctions because Congress had entrusted that function to the executive branch. (Pet. Br. pp. 21, 22). The court, however, took pains to explain that the contempt sanction was, indeed, "suggested" by Section 176(a) but that the court was not imposing Section 176(a) as the contempt sanction. (Appendix 25a, 37a). Defendants contend that a court abuses its discretion if it fashions a civil contempt sanction in the image of a statutory enactment designed for the same purpose. Such a contention is wooden. Defendants cite no case to support their contention.

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12. (Cont'd.)

(2) where transportation control measures are necessary for the attainment of such standard, and

(3) where the Administrator finds after July 1, 1979, that the Governor has not submitted an implementation plan which considers each of the elements required by section 172 or that reasonable efforts toward submitting such an implementation plan are not being made (or, after July 1, 1982, in the case of an implementation plan revision required under section 172 to be submitted before July 1, 1982).

2. The Contempt Sanction Does Not Conflict With *Gautreaux v. Romney*, 457 F. 2d 124 (7th Cir. 1972).

Defendants allege that the district court did not consider the effects of the contempt sanction on the public and therefore the contempt sanction is in conflict with *Gautreaux v. Romney*, 457 F. 2d 124 (7th Cir. 1972). The defendants are mistaken.

It cannot be doubted that the cut-off of highway construction funds will cause some inconvenience to the public and will affect employment conditions in the areas covered by the sanction. By enacting Section 176(a) Congress established a policy giving primacy to air quality, because of its importance to public health, and making federal assistance for highway construction dependent on state cooperation with the national effort to achieve cleaner air.

This was not an arbitrary Congressional decision. It was based on the recognition that the extension of our highway system tended to increase carbon monoxide and ozone pollution and, therefore, that public health could be protected only if the states undertook those pollution abatement systems, such as the I/M program, which could compensate for the added pollution emissions that accompany the extension of the highway system. 123 Cong. Rec. 9168 (1977).

In the light of this Congressional policy it cannot be said that the district court's contempt sanction was neglectful of the public's interests.

And the contempt sanction is not in conflict with *Gautreaux v. Romney, supra*. *Gautreaux* invalidated an injunction withholding Model Cities grants as an equitable remedy for racial discrimination practices in Chicago's public housing program because the Model Cities program

had not been found tainted and the receipt of Model Cities grants had not been conditioned by Congress on local housing policies. *Gautreaux*, therefore, is distinguishable from the I/M case because the contempt sanction in the I/M case withholds grants which were explicitly conditioned on state implementation of the I/M program. Accordingly, no conflict exists between *Gautreaux* and the decision in the I/M case.

3. The Contempt Sanction Does Not Impermissibly Intrude on the Operations of the Commonwealth and Does Not Conflict With *Rizzo* v. *Goode*, 423 U. S. 362 (1976).

The contempt sanction enjoined the U. S. Secretary of Transportation from approving federal-aid highway grants but it exempted from the injunction federal-aid highway grants intended for "safety, mass transit or transportation improvement projects related to air quality improvement or maintenance." (Appendix, p. 33a). Because the injunction was selective the Court had need to establish a procedure through which to administer it. The procedure (Appendix, p. 32a) provides that the U. S. Secretary of Transportation certify to the court all grants which he approves and furnish the court with a brief statement outlining the factual grounds for the approval. The Secretary's approvals become final in 30 days unless within that time the court issues an order staying the approval.

Defendants contend that this procedure impermissibly intrudes on the operations of the Commonwealth (Pet. Br., p. 26a) and that it, therefore, conflicts with *Rizzo* v. *Goode*, 423 U. S. 362 (1976).[13] In *Rizzo* this Court in-

13. Defendants also cite *Bell* v. *Wolfish*, 441 U. S. 520 (1979), in which a district court order establishing prison regulations for pre-trial detainees was invalidated because the court was too en-

validated an equitable remedy because it "significantly revis[ed] the internal procedures of the Philadelphia police department" sharply limiting the department's latitude in the operation of its internal affairs. 423 U. S. at 379. The contempt sanction in the I/M case, in contrast, does not revise or amend the internal procedures of any branch or department of the Commonwealth.

The contempt sanction cuts-off certain federal-aid highway grants. The procedure for administering the sanction, of which the defendants complain, is not the sanction. And the procedure does not interfere with the Commonwealth's internal operations since it does not relate to those operations in any manner. Rather than being excessively intrusive the procedure established by the Court is completely non-intrusive and therefore is not an abuse of the court's discretion.

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13. (Cont'd.)

meshed "in the minutiae of prison operations". 441 U. S. at 562. The I/M contempt sanction, in contrast, contains no regulations in respect to the Commonwealth's internal operations and therefore no conflict exists between these decisions.

CONCLUSION

For the foregoing reasons Respondents, Delaware Valley, respectfully request this Court deny the Petition for a Writ of Certiorari to review the judgement of the Court of Appeals.

Respectfully submitted,

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No. 82-274

In the Supreme Court of the United States

OCTOBER TERM, 1982

COMMONWEALTH OF PENNSYLVANIA, ET AL.,
PETITIONERS

v.

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAR AIR,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in holding petitioners in contempt of a consent decree.

2. Whether the district court erred in its choice of a sanction for petitioners' contempt.

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OPINIONS BELOW

The opinion of the court of appeals on the merits (Pet. App. 50a-68a) is reported at 678 F. 2d 470. The opinions and orders of the court of appeals on the application for a stay (Pet. App. 39a-49a) are unreported. The opinions and orders of the district court (Pet. App. 1a-34a, 35a-38a) are reported at 533 F. Supp. 869 and 533 F. Supp. 885.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1982. The petition for a writ of certiorari was filed on August 17, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Amendments Act of 1970, 42 U.S.C. 1857 *et seq.*, required each state to submit to the Environmental Protection Agency (EPA) a state implementation plan for reducing air pollution to meet certain national standards. 42 U.S.C. 1857c-5.[1] Petitioner Commonwealth of Pennsylvania submitted a plan that included, among other things, an inspection and maintenance (I/M) program for automobile emission systems (Pet. App. 53a). The EPA modified and promulgated the plan; the Commonwealth sought review of certain aspects of the plan as promulgated, although it did not challenge the provisions dealing with the I/M program. *Id.* at 53a-54a; see *Commonwealth of Pennsylvania* v. *EPA*, 500 F. 2d 246 (3d Cir. 1974).

The Commonwealth never implemented the I/M program. In 1976, respondent Delaware Valley Citizens' Council for Clean Air (Delaware Valley) sued petitioners—the Commonwealth and certain state agencies—in the United States District Court for the Eastern District of Pennsylvania, seeking to require petitioners to implement the I/M program. In 1977 the United States also sued petitioners, seeking similar relief. On August 29, 1978, petitioners entered a consent degree with Delaware Valley and the United States, agreeing to implement an I/M program for certain areas by August 1, 1980 (Pet. App. 54a). The consent decree was embodied in an order of the court.

In March 1980, the parties and the court agreed to extend the deadline for implementing the program to May 1, 1981. Petitioners failed to meet that deadline. In June 1981, the district court, after learning from the EPA that air quality in

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[1]The Clean Air Act was amended in 1977. See 42 U.S.C. (Supp. IV) 7401 *et seq.* The provision governing state implementation plans now appears at 42 U.S.C. (Supp. IV) 7410.

the areas covered by the decree still did not meet the specified national standard, refused to extend the deadline further. The court declared petitioners to be in violation of the consent decree and ordered them to submit a plan for the immediate implementation of the I/M program. The court modified that plan and ordered that it be implemented by May 1, 1982. On petitioners' appeal, the court of appeals unanimously affirmed. Pet. App. 55a-56a. In *Commonwealth of Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, petition for cert. pending, No. 81-2331 (filed June 21, 1982), petitioners seek review of this decision.

2. Following the district court's decision of June 1981, the Pennsylvania legislature enacted a statute, H.B. 456, over the governor's veto, prohibiting the expenditure of any funds on the I/M program. Delaware Valley then moved to have petitioners declared in contempt (Pet. App. 56a).

In a lengthy opinion, the district court declined to consider H.B. 456 to be a changed circumstance that warranted modification of its order. The court noted that "the Commonwealth of Pennsylvania with a full range of technical and professional guidance and representation at its disposal entered, after considerable opportunity for deliberation and negotiation, into a consent decree in which it agreed to implement an I/M program" (Pet. App. 21a). The court further stated (*id.* at 21a-22a): "In this case, there is no doubt that [petitioners] are no longer complying with the consent decree. [Petitioners] themselves admitted, that with the passage of H.B. 456, they had discontinued all efforts to implement an I/M program * * *." The court accordingly declared petitioners to be in civil contempt.

The court then considered what sanctions to impose. It decided that Section 176(a) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7506(a), provided a useful analogy. Section 176(a) specifies that if a state does not submit an adequate

implementation plan, the Secretary of Transportation shall not approve the award of any highway funds. The district court examined the legislative history of Section 176(a) and determined that its "coercive purpose * * * is clear" (Pet. App. 26a). The court reasoned that Section 176(a) provided the proper analogy because petitioners' actions effectively rendered key portions of the Commonwealth's implementation plan a nullity—as if the plan had never been submitted at all. The court accordingly (Pet. App. 29a)—

> enjoin[ed] the United States Secretary of Transportation from approving any projects or awarding any grants to the Commonwealth of Pennsylvania for highway projects in the * * * areas * * * defined in the consent decree, other than those grants required for safety, mass transit, or transportation improvement projects related to air quality improvement in those same * * * areas.

The court concluded that this sanction "serves to promote the underlying goal of the consent decree and the philosophies behind the enactment of the Clear Air Act" (*id.* at 30a), and that it "will not interfere with state sovereignty since it permits the state's action to stand as long as the state * * * remain[s] adamant in its refusal to establish the I/M program it agreed to, while it also encourages the state to reconsider its position and comply with the consent decree" (*ibid.*).

3. The court of appeals initially stayed the district court's order, although it unanimously "express[ed its] great concern regarding the failure of the General Assembly of Pennsylvania to enact legislation to implement the Consent Decree. Whatever question there may be regarding the precise contours of the district court's power to provide an equitable remedy in a situation such as * * * this case, there would appear to be no question regarding the obligation of the various state agencies to take steps to implement a

Consent Decree entered into a number of years ago and which in turn was utilized to obtain substantial funds from the Federal Government" (Pet. App. 40a).

Judge Garth dissented; he would simply have denied the stay (except to permit the United States to provide funds in case of an emergency). Judge Garth explained (Pet. App. 48a-49a):

> I do not believe that the Commonwealth should be permitted to flout orders of the United States District Court with impunity. The Governor of Pennsylvania, in vetoing [H.B.] 456 * * * had warned the legislature that federal highway funds might well be cut off if the bill were passed. * * * While I firmly believe that federal courts should not interfere with matters that are purely state prerogatives, * * * this case involves substantially different interests and considerations.

After hearing argument on the merits, the court of appeals affirmed the district court's order "in all respects" (Pet. App. 68a), holding that the district court had acted within its discretion by choosing a remedy suggested by the Clean Air Act itself (*id.* at 65a-67a). It noted that "[a]ny harm resulting to the citizens of Pennsylvania from a lack of federal highway funds can easily be brought to an end by actions of their elected representatives in the state legislature" (*id.* at 68a). The court of appeals then vacated its stay of the district court's order without dissent. On September 9, 1982, this Court denied petitioners' application for a stay of the court of appeals' judgment.

ARGUMENT

The district court correctly held that petitioners violated a court order reflecting an obligation they had voluntarily accepted; the court then chose an appropriate sanction. These determinations, well within the district court's discretion, do not warrant this Court's review.

1. In the consent decree, petitioners agreed to implement the I/M program by a certain date, and they did not do so. They therefore violated the decree. Petitioners appear to assert (Pet. 10-16) that the district court was precluded from finding them in violation because the reason for their disobedience was an action of the state legislature that took the form of a restriction on the use of appropriated funds. But while the reason for the violation might properly affect the choice of a sanction, it does not alter the fact that the court's order was violated.

Petitioners rely on the Second Circuit's decision in *New York State Association of Retarded Children, Inc.* v. *Carey*, 631 F. 2d 162 (1980). But as the court below recognized (see Pet. App. 62a), and the Second Circuit explained, the consent decree in *Carey* explicitly "envisioned the practical and political difficulties which the Governor [a party to the decree] necessarily faced regarding the appropriation of funds * * *. [Specifically,] the governor consented only to act within his 'lawful authority * * * and subject to any legislative approval that may be required' " (631 F. 2d at 166). The consent decree entered by petitioners contained no such express limitation, and neither the district court nor the court of appeals found such a limitation to be implied. Petitioners suggest no reason for this Court to reconsider the construction of the consent decree by the lower courts.

Nor can it plausibly be argued—as petitioners seem to suggest (*e.g.*, Pet. 13)—that every federal court order directed to a state is necessarily subject to the condition that it will be of no effect if the state legislature does not appropriate the funds necessary to obey the order. A "[s]tate-law prohibition against compliance with [a] District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution" (*Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 695 (1979); see also *North*

Carolina State Board of Education v. *Swann*, 402 U.S. 43, 45 (1971)), and a state may not evade this principle by the expedient of enacting its "prohibition" in the form of a limit on the use of appropriated funds. It is inconceivable, for example, that a federal court's writ of habeas corpus, directed to a state official, could be defeated by the state legislature's prohibiting any funds from being spent to release the person held in custody.[2]

2. In determining the appropriate sanction, the district court did take into account the fact that a legislative restriction on appropriations was the reason for petitioners' disobedience. The court did not, for example, require Pennsylvania officials to defy state law and spend the necessary funds under threat of personal sanctions; nor did it direct sanctions at members of the legislature.[3] Instead, the

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[2] *Brewster* v. *Dukakis*, 675 F. 2d 1 (1st Cir. 1982), on which amici Greater Pittsburgh Chamber of Commerce, *et al.*, rely (Amici Br. 7-8), is in fact inconsistent with the position taken by petitioners. In *Brewster*, the district court specifically interpreted the decree to require only that state officials use their best efforts to obtain funds from the state legislature. 675 F. 2d at 3. The court of appeals upheld this interpretation only after carefully examining the text of the decree and determining that by its terms it required only the officials' best efforts and did not mandate that the necessary funds be spent (*id.* at 4 & nn.3, 4); implicit in this approach is the assumption that a decree could mandate actions by a state that require the appropriation of funds.

[3] In this respect, also, this case differs from *Carey*; there the district court apparently found state officials in contempt for not spending funds in a way that state law prohibited. See 631 F. 2d at 164-165. The court of appeals in *Carey* indicated that it would approve a sanction, analogous to that imposed by the district court here, that gave the state a choice between appropriating the necessary funds and facing some undesirable consequence; such a sanction, the Second Circuit said, "leaves the question of the expenditure of state funds in the hands of citizens of the state, not in the hands of federal judges." *Id.* at 165.

Similarly, in *Welsch* v. *Likins*, 550 F. 2d 1122 (8th Cir. 1977), on which amici rely (Amici Br. 8-9), the court of appeals vacated a district court order that required state officials to spend funds that had not been appropriated by the state legislature to improve a mental institution to

district court looked to the statute that its decree was issued to enforce and fashioned a remedy that it believed best effectuated the purpose of that statute.[4]

Petitioners also contend (Pet. 23-25) that the district court abused its discretion by not attaching proper weight to the interests of those who use Pennsylvania highways and profit from their construction. But the court of appeals upheld the district court's exercise of its discretion, and the district court's balancing of the equities closely reflected the balance Congress struck when it enacted the Clean Air Act.[5] There is accordingly no reason for this Court to intervene. We do not suggest that the district court's approach was the only reasonable one; in other circumstances, we might

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meet constitutional requirements; the court ruled that the state might instead choose other options, such as closing the institution or reducing the number of patients. The court in *Welsch* emphatically rejected the suggestion that the state's obligation to comply with a court order depended on the legislature's willingness to appropriate the necessary funds. See 550 F. 2d at 1132.

[4]Petitioners assert (Pet. 19-22) that the district court's sanction infringes *Congress's* prerogatives to appropriate and spend money; they cite *State Highway Commission* v. *Volpe*, 479 F. 2d 1099 (8th Cir. 1973) in support of this contention. But the suits (brought by Delaware Valley and the United States) that culminated in the consent decree violated by petitioners were authorized by the Clean Air Act. Congress obviously envisioned that such suits would be brought and would sometimes result in decrees requiring certain actions by the states. Petitioners suggest no reason for believing that Congress intended district courts to be powerless to impose sanctions to enforce such a decree if a party disobeyed it. By choosing a sanction suggested by the Clear Air Act itself, the district court plainly acted in a fashion fully consistent with Congress's intentions.

[5]In making this contention, petitioners assert a conflict between the decision below and *Gautreaux* v. *Romney*, 457 F. 2d 124 (7th Cir. 1972) But *Gautreaux* involved a different sanction, imposed for different purposes, with different competing interests at stake; and the sanction imposed in *Gautreaux* did not closely correspond with a scheme of sanctions chosen by Congress.

advocate a remedy that did not have as severe an impact on an ongoing federal program. But on the facts of this case, the district court's approach was plainly appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 82-274

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COMMONWEALTH OF PENNSYLVANIA *et al.*,
Petitioners

v.

DELAWARE VALLEY CITIZENS' COUNCIL
FOR CLEAN AIR *et al.*,
Respondents

and

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY TO OPPOSITIONS TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO OPPOSITIONS TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This reply brief is respectfully submitted by Petitioners, the Commonwealth of Pennsylvania, Thomas D. Larson, the Secretary of the Pennsylvania Department of Transportation, and Peter S. Duncan, the Secretary of the Pennsylvania Department of Environmental Resources, in support of their Petition for Certiorari, which is presently pending before this Court.

ARGUMENT

The opposing briefs of Delaware Valley Citizens' Council for Clean Air ("Delaware Valley") and the United States have not shown that the Second Circuit's decision in *New York State Association for Retarded Children, Inc. v. Carey*, 631 F.2d 162 (2d Cir. 1980), which conflicts with the Third Circuit's decision in this case (*Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*, 678 F.2d 470 (3d Cir. 1982), is distinguishable from this case. The opposing parties have chosen to ignore Petitioners' legal argument that, even with the "Commonwealth" as a party to the 1978 Consent Decree, the Consent Decree could not possibly have provided for an infinite funding stream by the 1978 General Assembly and all future General Assemblies for the emission control inspection and maintenance ("I/M") program. See *Commonwealth ex rel. Fortney v. Bartol*, 342 Pa. 172, 174-75, 20 A.2d 313 (1941), and cases cited therein. The opposing parties also overlook the provisions of the Pennsylvania Constitution and established caselaw that implicitly incorporate into the Consent Decree the "practical and political difficulties" that happened to be explicitly recognized in the consent decree in *Carey*. See Pennsylvania Constitution, Article III, Section 24; *Shapp v. Sloan*, 480 Pa. 449, 473, 391 A.2d 595, 606 (1978), appeal dismissed *sub nom., Thornburgh v. Casey*, 440 U.S. 942 (1979). Finally, Delaware Valley and the United States have totally ignored their prior admissions that the Consent Decree did not require the Pennsylvania Legislature to appropriate funds for I/M. *See* Petition for Certiorari, p. 13, n.9.

The constitutional and political ramifications of the Respondents' arguments as adopted by the Third Circuit are frightening and strike at the heart of the constitutional right of a state legislature (and the U.S. Congress)

to control its own financial affairs. To hold that an executive branch lawyer can bind both presently-sitting and future legislatures to fund a consent decree destroys the delicate balance between the executive, judicial and legislative branches of government. The appropriations power is constitutionally reserved to the legislature and cannot be usurped by an assistant attorney general who never represented the legislature in this action. Moreover, even if the legislature sitting in 1978 were a party, it could not legally bind subsequent legislatures to continue to fund such a decree. *Stone v. Mississippi*, 101 U.S. 814 (1880). Therefore, no federal district court should be permitted to hold a state in contempt for the legislature's exercise of its constitutional right to reject proposed appropriations for the I/M program.

The United States makes an imperfect analogy to decisions in which a "state law prohibition against compliance with a district court's decree cannot survive the supremacy clause of the United States Constitution." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695 (1979). The United States neglects to mention, however, that this rule was distinguished in *New York State Association for Retarded Children v. Carey*, *supra*, where the Second Circuit correctly declined to require a state official to "expend state funds for a purpose expressly disallowed by the state legislature." 631 F.2d at 165.

The United States' suggestion that *Carey* would allow a sanction of an alternative between appropriating the necessary funds and facing some undesirable consequence (Brief in Opposition, p. 7, n.3) is misleading. This suggestion is drawn from dictum in the *Carey* opinion in which the Second Circuit discussed the alternatives in correcting constitutional violations at state institutions for the retarded. This remedy is not applicable here be-

cause this case, unlike *Carey*, involves police power issues rather than allegations of state deprivation of federal constitutional rights.

The United States further suggests an analogy to a state legislature's cutoff of appropriations for releasing an incarcerated individual in the face of a federal court's writ of habeas corpus. This is an irrelevant and imperfect analogy. Habeas corpus has no application to this case. There has never been any suggestion that the legislature's cutoff of I/M appropriations violated fundamental constitutional rights. Therefore, lower courts in this case were not intervening to restrain a state from violating fundamental constitutional rights. Instead, the lower courts here are trying to coerce the state itself to perpetually fund the exercise of a discretionary police power function. The existence of a consent decree is not material because no official or branch of the state government has the power to bind its successors to a perpetual funding stream. *Commonwealth ex rel. Fortney v. Bartol, supra.*

Delaware Valley attempts to argue that the Petitioners entered into the Consent Decree and used the Consent Decree to qualify for conditioned federal highway aid funds under Section 176(a) of the Clean Air Act, 42 U.S.C. § 7506(a). Section 176(a) does not pre-condition the receipt of federal aid highway funds on having an I/M program or entering into a consent decree, as Delaware Valley would have this Court believe; rather, Section 176(a) authorizes the Executive Branch to refuse to approve highway projects or highway funds after making a finding that a state has not *submitted* a state implementation plan under the Clean Air Act—which Pennsylvania has submitted in this case. The I/M program is but one part of the multi-faceted state implementation plan. At no time did the Petitioners "use" the consent

decree to qualify for conditional federal and highway funding. It is astounding that the Respondents would distort the facts and law of this case to suggest that the Petitioners used the Consent Decree to meet advance conditions for receiving highway funds when neither the Consent Decree nor Section 176(a) imposes such conditions and Section 176(a) is not even applicable to this case.

Nor do Delaware Valley or the United States disprove the conflict between the Third Circuit's decision and the decision of the Eighth Circuit in *State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099 (8th Cir. 1973). Delaware Valley's argument against the relevance of *State Highway Commission of Missouri v. Volpe* centers upon the existence of an Executive Branch sanction for highway funds under Section 176(a) of the Clean Air Act, and again argues that Section 176(a) imposes an express condition of state implementation of an I/M program on federal aid highway grant approvals. This argument is simplistic and inaccurate and mistakenly characterizes the Petitioners' position. Petitioners do not dispute that Section 176(a) provides for Executive Branch sanctions. Rather, Petitioners argue that, under the *Volpe* doctrine, (1) only Congress can set forth the terms upon which highway funds can be spent, and (2) in Section 176(a), Congress has established sanctions to be imposed only by the Executive Branch, and which in any event cannot be imposed in this case. The opposing parties neglect the fundamental distinction between the situation covered by Section 176(a)—the failure to even submit a state implementation plan—and this case, in which Pennsylvania has been disabled from carrying out a portion of the state implementation plan which it has submitted because of a legislative cutoff of funds. At most, Section 176(b) sanctions might apply in this case.

In attempting to defend the Court's mistaken imposition of the Section 176(a) sanction, Delaware Valley points out that the District Court said that it was not imposing Section 176(a) and the contempt sanction, but only that the contempt sanction was "suggested" by Section 176(a). This suggestion and the lower courts' actions were disingenuous. There is no basis for distinguishing between imposing a statutory sanction and imposing the identical sanction because it was "suggested" by a statute, especially where Congress clearly provided that the EPA Administrator was to impose Section 176(b) —and not 176(a)—sanctions in cases where states are not implementing a portion of a previously submitted state implementation plan. The United States' brief says that Petitioners' argument suggests that Congress intended district courts to be "powerless" to impose sanctions to enforce the decree. The United States overlooks the Petitioners' statement that a court could have referred this case to the responsible agency for imposition of sanctions. Further, by making this argument, the United States implies that Congress itself intended that one of its remedies, the Section 176(b) cutoff of program grant funds for failure to implement portion of a SIP, be ignored by the courts.

Finally, both parties mistakenly distinguished *Gautreaux v. Romney*, 457 F.2d 124 (7th Cir. 1972), in an attempt to show that there is no conflict between the Third Circuit and the Seventh Circuit on the scope of the contempt sanction in this case. Delaware Valley suggests that the "inconvenience" to the public and loss of employment must defer to a congressional policy which recognized that the I/M program could compensate for added pollution that accompanied the extension of the interstate highway system, quoting 123 Cong. Rec. 9168 (1977). What Delaware Valley neglects, however, is that this citation to

"congressional policy" refers to a Senate debate *before* Congress rejected that "policy" and instead adopted a two-track system of sanctions in the final version of the Clean Air Act, which had a lesser sanction under Section 176(b) for failure to implement a state implementation plan. The *Gautreaux* decision is in conflict with the Third Circuit's decision, because neither in *Gautreaux* nor in this case were the federal grants withheld by the lower courts explicitly conditioned upon state implementation of a federal program. The distinction alleged by the United States, that the sanctions imposed in *Gautreaux* did not closely correspond with the scheme of sanctions chosen by Congress, depends on the inaccurate conclusion that Section 176(a) of the Clean Air Act applies in this case. In fact, in Pennsylvania the United States is proceeding to impose Section 176(b) sanctions but has notably refrained to act under Section 176(a). Moreover, the Third Circuit Opinion conflicts with the decision of this Court in *City of Newport v. Facts Concerts, Inc.*, 453 U.S. 247 (1981) which held that punitive sanctions "should [not] be visited upon the shoulders of blameless or unknowing taxpayers." 453 U.S. at 267.

In summary, the lower courts have imposed the drastic sanction of cutting off federal highway funds for Pennsylvania Legislature's decision not to perpetually fund the I/M program, even though Pennsylvania could not legally or practically have bound itself to such funding. The decisions reached and remedies imposed by the lower courts in this non-constitutional case are inconsistent and excessive when compared with the judicial caution exercised by other courts even in constitutional cases. *Compare Delaware Valley Citizens' Council for Clean Air*, *supra*, with *Carey*, *supra*, and *Gautreaux*, *supra*. This Court should exercise its powers to review and reverse these excesses of the lower courts.

CONCLUSION

For the reasons stated herein, and the reasons stated in the Petition for Certiorari filed by the Commonwealth of Pennsylvania, the Secretary of the Pennsylvania Department of Transportation and the Secretary of the Pennsylvania Department of Environmental Resources on August 18, 1982, the instant Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief In Support Of Petition For Writ Of Certiorari Of The Greater Pittsburgh Chamber Of Commerce, The Greater Philadelphia Chamber Of Commerce, Associated Pennsylvania Constructors, Pennsylvania Asphalt Pavement Association, County Of Allegheny, City Of Pittsburgh, Pennsylvania State Council Of Carpenters, And Allegheny County Labor Council As *Amici Curiae*

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE*

The Greater Pittsburgh Chamber of Commerce, The Greater Philadelphia Chamber of Commerce, Associated Pennsylvania Constructors, Pennsylvania Asphalt Pavement Association, County of Allegheny, City of Pittsburgh, Pennsylvania State Council of Carpenters, and Allegheny County Labor Council respectfully submit this Brief as *amici curiae* in support of the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*, 678 F.2d 470 (3d Cir. 1982), entered on May 21, 1982.

INTEREST OF THE *AMICI CURIAE*[1]

The *amici curiae* urge this Court to grant the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Third Circuit in *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*, 678 F.2d 470 (3d Cir. 1982). In *Delaware Valley*, the Third Circuit affirmed the decision of the United States District Court for the Eastern District of Pennsylvania dated January 22, 1982, 533 F. Supp. 869, as amended February 18, 1982, 533 F. Supp. 885.

The district court below held the Commonwealth of Pennsylvania in contempt of court for failure to carry out the terms of a consent decree providing for implementation of an automobile emissions inspection and maintenance program (hereinafter "I/M program"). As an aspect of its contempt order, the district court also ordered the United States Secretary of Transportation not to approve any highway projects or to award any highway grants in the Pittsburgh and Philadelphia metropolitan areas unless the Secretary and the district court found such projects and grants to be related to safety, air quality, or mass transit. The Third Circuit affirmed the district court's contempt order.[2]

Amici curiae are a diverse group. The County of Allegheny is a governmental unit in the Commonwealth of Pennsylvania with a population of more than one million citizens and with more than 130 units of local government within its geographic confines. The City of Pittsburgh, located within the County, is a municipal corporation organized and existing under the laws of the Commonwealth of Pennsylvania.

The Greater Pittsburgh Chamber of Commerce and The Greater Philadelphia Chamber of Commerce are nonprofit associations representing the business and professional communities in the Pittsburgh and Philadelphia areas, respectively. Both work to establish and maintain cooperative and productive relations

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[1]Pursuant to Supreme Court Rule 36.1, *amici curiae* have obtained from all parties to this action their written consent to submit this Brief in Support of the Petition for Writ of Certiorari. Each consent is on file with the Clerk of this Court.

[2]A more complete statement of the case may be found in the Petition for Writ of Certiorari at page 5 *et seq.*

between the business community and the public sector with the hope of improving the economic well-being of their regions.

The Associated Pennsylvania Constructors is a nonprofit trade association whose members are contractors and suppliers involved in the construction of highways, bridges, and other public works in Pennsylvania. Members of the Associated Pennsylvania Constructors, representing about ninety percent of the active private contractors in Pennsylvania performing highway construction work, are responsible for the majority of construction and maintenance contracts awarded by the Pennsylvania Department of Transportation.

The members of the Pennsylvania Asphalt Pavement Association, a nonprofit trade association representing the producers of asphalt concrete in the Commonwealth of Pennsylvania, are also vitally concerned with highway construction in Pennsylvania. The Association represents the owners and operators of over eighty percent of the asphalt concrete plants in the Commonwealth, plants that account for most of the asphalt concrete produced in the state.

The Pennsylvania State Council of Carpenters represents 30,000 working men and women throughout the Commonwealth of Pennsylvania. Its members perform all carpentry-related work on highway construction in Pennsylvania. The Allegheny County Labor Council represents over 100,000 workers performing trades in and about Pittsburgh. Its members are involved in all phases of highway construction.

The *amici curiae* have a common, overriding interest in the orderly development and proper maintenance of the transportation networks in the ten affected counties within the Pittsburgh and Philadelphia metropolitan areas. Crucial to this common interest of *amici* is a workable system for funding and administering the state's highway construction efforts. The district court's contempt order, however, makes long-range, short-range, and intermediate planning for highway construction impossible because of the interposition of a federal judge as the key decision-maker in the funding and administering of highway construction in Pennsylvania.

Because of the district court's contempt order, the economic distress already experienced in the regions serviced by the affected

transportation systems will be further aggravated while the people living within those regions will suffer physically, economically, and socially. The individuals and organizations comprised by *amici* will experience much of this harm. Transportation supports the Pittsburgh and Philadelphia metropolitan economies; industry, manufacturing, commerce, and service trades are all highly dependent upon local highway systems. Moreover, people living in (or traveling through) the affected areas will find their personal and business travels less comfortable and less safe.

SUMMARY OF ARGUMENT

The Commonwealth's Petition for Writ of Certiorari should be granted for the following reasons:

(1) *The Third Circuit's decision conflicts with the decisions of four other circuits.* Sup. Ct. R. 17.1(a). The Second Circuit's decision in *New York State Ass'n for Retarded Children, Inc. v. Carey*, 631 F.2d 162 (2d Cir. 1980), is contrary to the Third Circuit's decision in *Delaware Valley*, yet the two cases are nearly identical factually. In *Carey*, a district court order holding the Governor of New York in contempt of court was reversed because it was the legislature, and not the governor, that could provide funding for measures designed to secure the constitutional rights of the mentally retarded. Moreover, contrary to the Third Circuit's decision, the First Circuit has ruled that the remedial powers of a federal court in ordering compliance with a consent decree to which a state is a party are limited to requiring that a state's executive branch officials exercise "best efforts". *Brewster v. Dukakis*, 675 F.2d 1 (1st Cir. 1982).

The decision currently under review interferes not only with the executive branch of a state, but also with its legislative branch. Contrary to a ruling by the Eighth Circuit, the order issued by the district court and affirmed by the Third Circuit unduly interferes with the Commonwealth's appropriations process. *Welsch v. Likins*, 550 F.2d 1122 (8th Cir. 1977). Further, the decisions below do not adopt the balancing-of-interests test enunciated by the Seventh Circuit in the similar case of *Gautreaux v. Romney*, 457 F.2d 124 (7th Cir. 1972). The lower courts' exercise of equitable power has failed to take into account the unnecessary harm

inflicted upon third parties such as *amici* and the possible worsening of the air quality in the affected areas caused by the judicial interruption in highway construction. The purpose of the district court's order could have been achieved through the use of less intrusive alternatives that would not have adversely affected third parties.

Finally, the lower courts have ignored the Constitution's express and exclusive delegation of power to Congress to decide when and under what circumstances federal highway funds will be granted or withheld. *State Highway Commission v. Volpe*, 479 F.2d 1099 (8th Cir. 1973). Instead, the district court has arrogated to itself power to approve commencement of all highway projects involving U.S. Department of Transportation funds in the Pittsburgh and Philadelphia metropolitan areas.

(2) *The Third Circuit's decision conflicts with a decision of this Court.* Sup. Ct. R. 17.1(c). In *Rizzo v. Goode*, 423 U.S. 362, 379 (1979), this Court made clear that "appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief." In the present case, however, the Third Circuit gave short shrift to federalism concerns, even though the briefs of appellants and *amici curiae* below stressed the national importance of the issue. The Third Circuit's refusal to acknowledge and adhere to the federalism concerns that underlay the decision in *Rizzo* has resulted in a federal judicial invasion into a sphere of state operational autonomy—highway construction.

(3) *The uneasy and uncertain relationship of a federal court's equitable power to the federalism and separation doctrines, an issue of vital national importance, needs to be settled by this Court.* Sup. Ct. R. 17.1(c) As both subsequent case law and various commentators make clear, the scope and meaning of *Rizzo* remain uncertain. This Court must provide guidance for the lower courts if uniformity and clarity of the law are to be achieved in an area of unsurpassed importance to our nation.

Amici curiae also believe that the contempt order violates the separation of powers doctrine. The federal courts below have invaded functions of the Commonwealth's executive and legislative branches, as well as those of the United States Congress.

ARGUMENT

I. THE THIRD CIRCUIT'S DECISION IS IN CONFLICT WITH THE DECISIONS OF FOUR OTHER CIRCUITS.

A. The Second Circuit Has Held That A Governor Cannot Be Held In Contempt Of Court For Failure to Provide Funding For A Review Panel Charged With Remedying Constitutional Violations.

The United States Court of Appeals for the Second Circuit has rendered a decision in a case whose material facts are virtually indistinguishable from those in the present case. *New York State Ass'n for Retarded Children, Inc. v. Carey*, 631 F.2d 162 (2d Cir. 1980). Because the differences between the cases are immaterial, the attempted distinctions drawn below are of little guidance to courts that must deal with similar circumstances in the future.

In *Carey*, state agencies and officials, including the Governor, agreed in a federal court proceeding to a consent judgment providing for measures that would secure the constitutional rights of mentally retarded residents at the Willowbrook Developmental Center on Staten Island. When the state legislature refused to provide funding for a review panel, as required under the consent judgment, the United States District Court for the Eastern District of New York held the Governor in contempt, even though he "acted entirely in good faith." *Id.* at 164.

The Second Circuit reversed, holding that although "a state cannot avoid the obligation of correcting the constitutional violations of its institutions simply by pleading fiscal inability," the question whether state funds will be expended remains "in the hands of citizens of the state, not in the hands of federal judges." *Id.* at 165. Under the New York State Constitution, the Governor was powerless to provide funding for the review panel absent express legislative authorization.

In the present case, the Third Circuit distinguished *Carey* by noting that the wording of "the consent judgment in [*Carey*] in fact only required the Governor to seek financing subject to any legislative approval that may be required." *Delaware Valley*, 678 F.2d at 476. But this is a distinction without a difference. First, it is indisputable that consent decrees are construed as contracts. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238

(1975). And it is equally clear that, as a matter of law, the Pennsylvania General Assembly's power to withhold funding is an implicit term in any contract with the Commonwealth—even one affecting the balance of federal-state relations. *Shapp v. Sloan*, 480 Pa. 449, 473, 391 A.2d 595 (1978), *appeal dismissed sub nom. Thornburgh v. Casey*, 440 U.S. 942 (1979). Second, the Third Circuit simply ignored the political and institutional reality that the executive branch cannot force the legislature to act, for in the end, as the Second Circuit wrote in *Carey*, it is the legislature that "control[s] the purse-strings and determine[s] the priorities for the expenditure of State money." 631 F.2d at 166. *Compare* PA. CONST. art. III, §24.

B. The First Circuit Has Ruled That State Executive Branch Officials Can Be Held Only To "Best Efforts" To Obtain Funding for Federal Consent Decree Obligations.

Like *Carey*, *Brewster v. Dukakis*, 675 F.2d 1 (1st Cir. 1982), concerned violations of constitutional and statutory rights of the mentally disabled. The Commonwealth of Massachusetts, represented by various executive branch officials (including the Governor), agreed to a consent decree with provisions for the implementation of a comprehensive system of community mental health and retardation services. Two and one-half years later, the legislature appropriated five million dollars less than what the officials had requested for the programs. The district court, interpreting the decree, issued an injunctive order from which an appeal was taken.

The United States Court of Appeals for the First Circuit affirmed that part of the district court's order requiring the state officials to exert best efforts to secure funding before making any cuts in services: "Although the programmatic provisions of the consent decree are often phrased as mandatory obligations of the state, we must interpret the provision requiring best efforts to fund these obligations as an overriding provision that modifies the apparently mandatory nature of these obligations." *Id.* at 4. The First Circuit in effect held that "best efforts" constituted a ceiling on what the consent decree could require of the Massachusetts officials. No more should be expected of the Pennsylvania officials in the present case.

Other parts of the order in *Brewster*, such as a paragraph requiring the appellants "to develop, submit to bidding, contract and fund all community programs originally planned for FY '82," were vacated. In analyzing the district court's formation of a remedy, Chief Judge Coffin reasoned: "[T]he court cannot require appellants to go beyond what their good faith professional best efforts can reasonably be expected to accomplish." *Id.* at 5 (footnote omitted). In the instant case, Pennsylvania Governor Thornburgh certainly used his professional best efforts—for one thing, he vetoed H.B. 456, which prohibited funds for the I/M program—but, contrary to the Third Circuit's formalistic vision, he simply cannot control the votes of two hundred and fifty-three elected representatives and senators.[3]

C. The Eighth Circuit Has Ruled Against Federal Judicial Interference With A State's Appropriations Process.

The constitutional rights of the mentally retarded were again at stake in *Welsch v. Likins*, 550 F.2d 1122 (8th Cir. 1977). When the Minnesota Legislature failed to provide adequate funding to the Department of Public Welfare to carry out the district court's orders, the court enjoined the Commissioner of Administration and the Commissioner of Finance from complying with a provision of the Minnesota State Constitution and with eleven specific statutory provisions. "The obvious purpose of the order was to permit the Department of Public Welfare to comply with the earlier orders of the district court just as though the Minnesota Legislature had made appropriations adequate to permit compliance in accordance with normal Minnesota fiscal procedures." *Id.* at 1129.

The United States Court of Appeals for the Eighth Circuit held that the district court had overstepped its bounds:

> In this case we are dealing with the right of a sovereign state to manage and control its own financial affairs. *No right of a state is entitled to greater respect by the federal courts than the state's right to determine how revenues should be raised and how and for what purpose public funds should be expended.*

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[3]The Governor's veto of H.B. 456 was subsequently overriden.

> Conflicts between federal judicial power and state and local governments have arisen in the past and will doubtless arise again. But needless direct confrontations between a federal court and a state should be avoided, particularly in a field as delicate as the one here involved.

Id. at 1131-32 (emphasis added). By holding the Commonwealth in contempt, the lower courts have pushed this "confrontation" to the brink and have supplied the predicate for this Court's resolution of issues concerning "the right of a sovereign state to manage and control its own financial affairs." *Id.* As noted by the Pennsylvania Supreme Court in *Shapp v. Sloan*, 480 Pa. 449, 473, 391 A.2d 595, 607 (1978), *appeal dismissed sub nom. Thornburgh v. Casey*, 440 U.S. 942 (1979), "In the federal system the state retains its sovereign power over spending within the state, and under [the] Pennsylvania Constitution this sovereign power is to be exercised by the legislature." This "sovereign power" was assigned precious little weight by the courts below.

D. The Seventh Circuit's Balancing-Of-Interests Test Has Not Been Adopted By The Third Circuit.

In *Gautreaux v. Romney*, 457 F.2d 124 (7th Cir. 1972), the United States Court of Appeals for the Seventh Circuit had before it a district court order enjoining the defendant Secretary of the Department of Housing and Urban Development from releasing to the City of Chicago certain funds earmarked for the Model Cities Program. The lower court hoped to force the Chicago Housing Authority, the Chicago City Council, and the Mayor to make available low-cost public housing for low-income families.

Quoting *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971), the Seventh Circuit observed that "[i]n a Civil Rights case, the Court's task is 'to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.'" *Gautreaux*, 457 F.2d at 127. Thus, even when there are constitutional violations, a court must still balance all the interests involved before issuing an injunction. Here, there were no constitutional violations asserted against the Commonwealth but rather the claimed violation pertained exclusively to a consent decree. As a result of the district court's contempt order, millions of drivers will likely be faced with

increased congestion and hazardous conditions on a rapidly deteriorating highway infrastructure, jobs may be lost, and businesses may fail. Yet no balancing of interests is reflected in the decision of either the district court or the court of appeals.[4]

In *Gautreaux*, the Seventh Circuit also held it "improper for the District Court to threaten the termination of a program which was not tainted with discriminatory action in order to bring about a cure of a separate program which was found to have been so tainted." 457 F.2d at 127. Indeed, the same may be true here. In discussing §176(a) of the Clean Air Act, 42 U.S.C. §7506 (Supp. II 1978), the source of the "suggested remedy" imposed by the courts below, one commentator observed with respect to the sanction of withholding transportation funding: "Even within a nonattainment area, a particular new highway might not contribute to the problem; conceivably it could help by reducing congestion." Battle, *Transportation Controls Under the Clean Air Act—An Experience in (Un)Cooperative Federalism*, 15 LAND & WATER L.R. 1, 57 (1980). *See also* Affidavit of Gary C. Triplett, Petitioners' Application for Stay. Nor can *repairing* existing highways "contribute to the problem" sought to be corrected by the district court's order. Instead, travel would be made both safer and more comfortable for all motorists if the affected highway construction were permitted to proceed unimpeded.

E. The Holding Of The Eighth Circuit, That Only Congress Can Determine The Conditions Under Which Highway Funds Can Be Withheld, Has Been Ignored By The Third Circuit.

At issue in *State Highway Commission v. Volpe*, 479 F.2d 1099 (8th Cir. 1973), were contract controls imposed by the United States Secretary of Transportation. The controls, which deferred authority to obligate highway funds previously apportioned to Missouri under the Federal-Aid Highway Act of 1956, as amended, 23 U.S.C. §101, *et seq.* (1970), were in response to

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[4]Had the district court considered the consequences of its order, it may well have adopted an equally effective but less extreme remedy. For example, the court could have employed another "suggested remedy" from the Clean Air Act and ordered withholding of funds to the Commonwealth under §176(b) of the Act, 42 U.S.C. §7506(b) (Supp. II 1978). There is no indication in the opinions of the courts below that they even considered such a less extreme remedy.

President Johnson's proposals "to curb inflation and assure the stability of the economy." 479 F.2d at 1108.

The Eighth Circuit found no express or implied authority in the Federal-Aid Highway Act for the Secretary to withhold funding for the proffered reasons. It is the Congress that must determine under what circumstances funds can be withheld by virtue of the power to "establish... post roads" vested in it by Article I, §8 of the Constitution. The court explained:

> It seems reasonable to say that until and unless Congress acted under Article I, neither the Secretary nor anyone else within the Executive branch of the government could build a federally aided highway system. *The only branch of government which has the constitutional power to build roads is the only one which has the authority to dictate the terms under which the construction can be carried out.*

Id. at 1111 (emphasis added). As the courts below have candidly admitted, they have withheld funding for highway construction absent congressional authorization. *Delaware Valley*, 678 F.2d at 478; 533 F. Supp. at 887. Furthermore, the district court *added* its own conditions to the approval of funding awards. 533 F. Supp. at 885. In doing both, the lower courts have trampled upon the constitutional line that clearly separates the Congress, which can "establish... post roads," from the other two branches, which cannot.

II. THE THIRD CIRCUIT'S DECISION IS IN CONFLICT WITH THIS COURT'S DECISION IN *RIZZO v. GOODE*.

The district court below noted that it "was merely exercising its equitable discretion to fashion an appropriate coercive sanction for the defendants' contempt." *Delaware Valley*, 533 F. Supp. at 887. Yet both it and the Third Circuit took no account of the following admonition in *Rizzo v. Goode*, 423 U.S. 362, 378 (1976):

> [W]here... the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the "special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law." *Stefanelli v. Minard*, 342 U.S. 117,

120, 96 L. Ed. 138, 72 S. Ct. 118 (1951), quoted in *O'Shea v. Littleton*, 414 U.S., at 500, 38 L. Ed.2d 674, 94 S. Ct. 669.

This balance between federal and state power was given little more than lip service below. In *Delaware Valley*, the Third Circuit took care to point out that "those Commonwealth officials sitting in the General Assembly certainly are not incapable of insuring the Commonwealth's compliance," 678 F.2d at 476, and that "[a]ny harm resulting to the citizens of Pennsylvania from a lack of federal highway funds can easily be brought to an end by actions of their elected representatives in the state legislature." *Id.* at 478-79. In other words, the contempt of court order remains in effect until the state legislature does that which the federal courts have, in effect, ordered it to do. Such a posture on the part of the federal judiciary hardly gives the Commonwealth "the widest latitude in the 'dispatch of its own internal affairs'." *Rizzo*, 423 U.S. at 378-79 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 (1961)).

Federalism is no empty concept, devoid of content. Justice Black spoke of "Our Federalism" as the

> notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger v. Harris, 401 U.S. 37, 44 (1971). This "comity," or respect, has not been accorded the Commonwealth. In a federalist system of government, "there is sensitivity to the legitimate interests of both State and National Governments." *Id.* Yet the lower courts have shown no sensitivity to Pennsylvania's executive branch officials, who have already exhibited their good faith and "best efforts," nor to the legislature, whose funding decision has been expressed in H.B. 456.

But beyond this somewhat intangible notion of comity, practical reasons dictate that the federalist balance be maintained. One noted jurist has observed:

> We must stand in awe and admiration of the decision of the Framers and of the success of the Supreme Court in

> fleshing it out—preventing one state from sitting in the way of others and endowing the central government with power to act on a national basis when Congress finds this to be warranted, *but leaving to the states the final decision on the bulk of day-to-day matters that can best be decided by those who are closest to them.*

Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019, 1034 (1977) (emphasis added). Yet the district court's order, affirmed by the Third Circuit, makes the Commonwealth's day-to-day, not to mention long-term, management and planning of highway construction considerably more difficult, if not impossible. Because of the district court's contempt order, the efforts of many parties working together will be lost. *See* Affidavit of Harvey Haack, Petitioner's Application for Stay.

The dangers of unnecessarily intrusive judicial supervision of state functions are well known. It has been observed that administrative injunctions of the sort at issue here

> are especially intrusive. They introduce a dimension of supervision and oversight not present with declaratory judgments or statutory injunctions. Administrative decrees typically embody standards of conduct so general as to acquire their meaning only in specific application to particular aspects of a defendant's conduct, and inject a court into the middle of ongoing social relationships that are neither easy to alter nor easy to understand. As a result, administrative injunctions involve close monitoring of a defendant's performance over long periods of time, continual intervention to increase the specificity and otherwise modify earlier decrees, and the creation of adjunct agencies to assist on the policing of performance.

Fiss, Dombrowski, 86 YALE L.J. 1103, 1148 (1977). The intrusiveness here is aptly described by what the Commonwealth calls a "judicial receivership". Petition for Writ of Certiorari at 26. *See also Delaware Valley*, 533 F. Supp. at 885 (setting forth the district court's requirements before projects may be approved or grants awarded in the affected areas).

The courts below have exceeded the proper scope of their authority. *Amici curiae* think the better rule is this: "Only when a federal program coopts the state's political processes by interfer-

ing with legislative and executive direction in a significant way should the courts have to intervene." Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 890 (1979). The courts below have inverted this rule, intervening not to avoid excessive federal interference with state governmental functions, but rather to "coopt the state's political processes."

III. THE UNCERTAIN RELATIONSHIP OF A FEDERAL COURT'S EQUITABLE POWER TO THE FEDERALISM AND SEPARATION DOCTRINES HAS GENERATED MUCH CONFUSION WHICH MUST BE RESOLVED BY THIS COURT.

A. The Scope And Meaning of *Rizzo* Are Unclear.

By granting the Commonwealth's Petition for Writ of Certiorari, this Court can do more than just address those issues of comity, autonomy, and intrusiveness ignored by the courts below. The Court can, in addition, remove the uncertainty that has been generated by *Rizzo's* concern with the federalist balance, an uncertainty reflected in both subsequent case law and in numerous commentaries.

The United States Court of Appeals for the Ninth Circuit has, for instance, refused to grant an injunction compelling a regional planning authority to repeal a land use ordinance and, in its place, to enact a new one. *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir. 1977), *aff'd in part and rev'd in part on other grounds*, 440 U.S. 391 (1979). The appellate court reasoned: "Principles of federalism counsel against such affirmative intrusion into the executive branch of an agency of state or local government." *Id.* at 1366 (citing *Rizzo*).

The Seventh Circuit, however, found no such affirmative intrusion in *Youakim v. Miller*, 562 F.2d 483 (7th Cir. 1977), *aff'd on other grounds*, 440 U.S. 125 (1979). The court upheld a district court order requiring the Illinois Department of Children and Family Services to promulgate new rules and regulations consistent with other aspects of the order. It said that *Rizzo* was inapposite because "[a]lthough the federal courts must be constantly mindful of the adjustment to be preserved between federal equitable power and state administration of its own law, they must, and do, retain power to enforce compliance with federal statutes." *Id.* at 491.

Nor are the commentators in accord. One finds *Rizzo* "suggest[ing] the development of new, but as yet uncertain, constraints on the availability of federal equitable relief." *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 58, 247 (1976) (footnote omitted). A second sees no such uncertainty in *Rizzo*: "[T]he emphasis in *Rizzo* is upon federal court respect for the integrity of local government institutional structures as an end in itself." Gelfand, *The Burger Court and The New Federalism: Preliminary Reflections on The Roles of Local Government Actors in The Political Dramas of The 1980's*, 21 B.C.L. REV. 763, 780 (1980) (footnote omitted).

In discussing *Rizzo* and *O'Shea v. Littleton*, 414 U.S. 488 (1974), one constitutional scholar described the challenge facing this Court: "[T]he relationship between federalism and equity is far too complex to be captured by analogies to the literally inapplicable *Younger* rules: to explain the relationship, *the Court will actually have to articulate its conception of federalism.*" L. TRIBE, AMERICAN CONSTITUTIONAL LAW at 156 (1978) (footnote omitted) (emphasis added).

B. The Contempt Order Violates The Separation Doctrine At Both The Federal And State Levels.

The separation of powers doctrine, wrote Chief Justice Warren,

> was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no men or group of men will be able to impose its unchecked will.

United States v. Brown, 381 U.S. 437, 443 (1965). *See also National Mutual Insurance Co. v. Tidewater Transfer Company, Inc.*, 337 U.S. 582, 590-91 (1949) (opinion of Jackson, J.). Judge Bechtle's contempt of court order, affirmed by the Third Circuit, imposes his "unchecked will" upon Pennsylvania's legislative and executive branches as well as the United States Congress.

Amici curiae are well aware that Justice Brennan, for a plurality of the Court, wrote "that the separation-of-powers principle ... has no applicability to the federal judiciary's relation-

ship to the States." *Elrod v. Burns*, 427 U.S. 347, 352 (1976). But *Elrod* is distinguishable from the present case on two grounds. There, the alleged judicial interference was the Supreme Court's review of the dismissal of non-civil-service employees, not the judicial intrusion into two branches of state government as here. And second, review in *Elrod* was necessary to vindicate the employees' First Amendment rights, whereas the federal court orders below were imposed to force state compliance with a consent degree.

The contempt order is a sweeping judicial usurpation of power. The order holds the Commonwealth of Pennsylvania and certain of its executive branch officials in contempt for failing to implement fully a consent decree with which they have made every possible good faith effort to comply. Moreover, it prevents those same officials from carrying out the orderly administration of highway planning and management. It holds the state's appropriations process hostage until such time as the legislative will as expressed in H.B. 456 gives way to Judge Bechtle's funding priorities. And it invades the Congress's constitutionally delegated power to establish post roads and to determine the conditions under which highway projects and grants will be awarded or withheld.

If it is true that "the only basis for separation is to identify the division of power that least reduces the general power of each branch, thus maximizing the potential in each of the competing branches for both independent action and interference," then the division here is decidedly skewed in favor of the federal courts. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 697 (1978). The author continues:

> The following proposition summarizes this general and implied standard used by the Court to give the greatest possible effect to two inconsistent organizational principles: With respect to two inconsistent claims for power, deny the claim that represents the greater intrusion into, but not necessarily a more effective "check" of, the classically or textually defined functions of the competing branch.

Id. at 697-98.

Applying the principle to *Rizzo*, the same commentator observed that

> The claims of the nonjudicial branches for control over the details of personnel and complaint procedures for the city's police department were, on the record, only a limited intrusion into the court's corrective powers when compared to the scope of the court's intrusion into the normal executive decision-making process.

Id. at 717. Here, transportation planning for the Pittsburgh and Philadelphia metropolitan areas will now be controlled by a federal judge—not those officials who have been delegated those duties. This is an alarming development, for "[e]ven the most 'forward' court would pause long and hard at the prospect of a judicial receivership over all the numerous state authorities and powers that would have to be marshaled to deal effectively with air...pollution problems." Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1264 (1977).

The separation doctrine protects the independence and defines the function of each branch of government. And as one commentator has observed:

> Application of the constitutional principle of separation of powers to the federal judiciary's relations with the states does not necessarily imply rejection of either reform-minded constitutional interpretations or innovative decrees. If separation principles are applied to limiting judicial *remedies*, it requires no assumption of judicial deference to the other branches' judgments regarding the *meaning* of the Constitution.

Nagel, *supra* at 724. This analysis is especially apt in this case, where no constitutional violations are even at stake. It is this Court that must define the limits of a federal court's equitable power when the exercise of that power encroaches upon the rightful functions of other state and federal branches of government.

CONCLUSION

Amici curiae request that this Court grant the Commonwealth of Pennsylvania's Petition for Writ of Certiorari for the following reasons: 1) To resolve the conflicts between the Third Circuit's decision and the decisions of four other circuits; 2) To resolve the conflict between the Third Circuit's decision and the decision of this Court in *Rizzo*; and 3) To settle the uncertain relationship of the federal courts' equitable power to the doctrines of federalism and separation of powers.

Respectfully submitted,

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Dated: September 16, 1982

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Brief of *Amici Curiae* were served this 16th day of September, 1982, on counsel for all parties of record by depositing the same in the United States Mail, First Class, postage prepaid, addressed as follows:

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